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No. 16400 VOL 3109

United States
Court of Appeals
for the Ninth Circuit

ELSIE SUMMERS, Appellant,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE and LEWIS B. HUNTER, a co-partnership and HUBERT E. BONEBRAKE, M.D., individually, Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Northern Division

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—8-11-59

No. 16400

United States
Court of Appeals
for the Ninth Circuit

ELSIE SUMMERS, Appellant,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE and LEWIS B. HUNTER, a co-partnership and HUBERT E. BONEBRAKE, M.D., individually,
Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Idaho, Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellant.

HAWKINS & MILLER,
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Coeur d'Alene, Idaho,

Attorneys for Appellees.

In the United States District Court, District of Idaho, Northern Division

Civil Action No. 2115

ELSIE SUMMERS, Plaintiff,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE, and LEWIS B. HUNTER, a co-partnership and HUBERT E. BONEBRAKE, M.D., individually,
Defendants.

COMPLAINT

Plaintiff complains and for cause of action against the defendants alleges:

I.

That plaintiff, Elsie Summers, is a citizen and resident of the State of Montana; that defendants are citizens and residents of the State of Idaho; that the amount involved in this controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars.

II.

That at all times herein mentioned, the defendants Paul L. Ellis, Hubert E. Bonebrake and Lewis B. Hunter were, are and continue to be a co-partnership, engaged in business at Wallace, in the State of Idaho, of operating and conducting a hos-

pital for the care and treatment of human beings who are ill and in need of medical care, hospitalization, surgery, X-ray and nursing services and said defendants are thus engaged for profit, duly licensed as such and using the name and style of "Wallace Hotel."

III.

That, at all times herein mentioned the defendant, Dr. Hubert E. Bonebrake, was, he is and continues to be a duly licensed and practicing Doctor of Medicine in the State of Idaho.

IV.

That on or about the 28th day of March, 1952, the exact date now being unknown, and the defendants, after repeated demands, refusing to supply the information to plaintiff, but which date plaintiff will definitely obtain by the discovery process of this Court and now asks leave to insert the correct date herein when it is obtained, plaintiff engaged the services of the defendants to perform surgery upon her and furnish surgical, medical and hospital services to plaintiff in and about repair and treatment to plaintiff's uterus and female organs and the defendants undertook to furnish surgical, medical, nursing and hospital services and did furnish and perform such services for plaintiff.

V.

That said defendants negligently and carelessly conducted and performed said operation on the per-

son of the plaintiff through her abdomen and they negligently and carelessly did not exercise in plaintiff's case the reasonable and ordinary care and diligence ordinarily exercised by the physicians and surgeons in the City of Wallace and in the State of Idaho but did not exercise any reasonable care or ordinary care or diligence whatsoever and they should have and could have exercised in plaintiff's case and they negligently and carelessly left an operating and surgical needle in the abdomen of the plaintiff and in the vicinity of plaintiff's female organs and exact portion thereof being to plaintiff unknown and parts of plaintiff's were cut, bruised and scarred by said surgical needle and the tissues and tendons, flesh and parts of plaintiff's body were damaged—all as the proximate result of the defendants' negligence as aforesaid.

VI.

That subsequently plaintiff on several occasions returned to the defendants complaining of severe pain, soreness and agony in the area where they had operated on plaintiff and submitted herself to them for examination and said defendants negligently and carelessly failed to use ordinary care and negligently failed to use facilities which they had, such as would have been used by persons of like training and experience in the vicinity of Wallace, Idaho and thus negligently failed to discover said surgical needle and as the proximate result of said further negligence of defendants plaintiff continued to suffer great mental worry and extreme

pain and suffering and finally, plaintiff sought other physicians and surgeons and other hospitalization in the vicinity of Wallace, Idaho, and on August 5th, 1955, plaintiff discovered that a foreign substance was imbedded in her abdomen which appeared to be a surgical and operating needle and plaintiff, immediately thereafter and on or about August 9th, 1955, plaintiff necessarily was required to submit to a further operation for the removal of said surgical needle and the said needle was removed from her person.

VII.

That as the proximate result of the aforesaid negligence of the defendants plaintiff has been made to suffer great mental and physical distress, pain and worry and she alleges on her information and belief that she has been permanently injured all to her great damage in the sum of fifty thousand dollars.

VIII.

That further plaintiff has been required to incur, expense for medical services, physicians' services, hospitalization, X-rays and laboratory examinations reasonably required to be incurred by reason of her injuries and the negligence of the defendants and on her information and belief she alleges that she will require additional services in the future of like nature and the amount thereof is at present unknown but plaintiff alleges on her information and belief that it will amount to at least the sum

of $2500.00 and she has been further damaged in said sum of $2500.00; that said sum is a reasonable amount incurred and to be incurred for such services.

IX.

That plaintiff is informed and believes and therefore alleges that in the further treatment of her injuries aforesaid she will be required to lose wages from her earnings as a practical nurse from which she earns and is capable of earning the sum of $7.00 per day but at the time of the filing of this complaint no accurate estimate of the amount of such loss can be anticipated and plaintiff asks leave to insert in this complaint by amendment the amount thereof when it is ascertained.

Wherefore plaintiff prays judgment for the sum of fifty-two thousand five hundred dollars, against defendants, and for costs of suit, and for such other and further relief as to the court seems meet, just and proper in the premises.

/s/ JAMES W. INGALLS,
DOEPKER AND HENNESSEY,
of the Bar of Montana,

/s/ By MARK J. DOEPKER,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 29, 1957.

treated. She was thereby lulled into a sense of security. There is no showing in the Trimming case that the plaintiff therein was under such continuous treatment by the defendant doctor.

For this reason it is hereby Ordered that the Motion to Dismiss be, and the same is hereby, Overruled. Defendants may have ten days in which to file their answer.

Dated this 5th day of February, 1958.

/s/ CHASE A. CLARK,
Chief Judge, United States District Court, District of Idaho.

[Endorsed]: Filed February 6, 1958.

[Title of District Court and Cause.]

ANSWER

Come now the defendants, Wallace Hospital, Paul M. Ellis, Hubert E. Bonebrake and Lewis B. Hunter, a co-partnership, with Hubert E. Bonebrake, M.D., individually, and in answer to the Complaint, admit, deny and allege as follows:

I.

The defendants admit jurisdiction of the Court herein, but have no knowledge, information or belief as to the residence of the plaintiff, Elsie Summers, and therefore deny the same.

II.

The defendants deny Paragraph II of plaintiff's Complaint.

III.

The defendants admit Paragraph III of plaintiff's Complaint.

IV.

These defendants deny Paragraph IV of said Complaint. In further answer thereto, said defendants allege that on the 25th day of March, 1951, the plaintiff entered the Wallace Hospital, for surgical treatment, under the care of defendant, Hubert E. Bonebrake, M.D. On the 26th day of March, 1951, the defendant, Bonebrake, did perform surgery upon the plaintiff, performing a hysterectomy, appendectomy, and further correcting an Ectopic tubal pregnancy. That all such services, surgery and care were performed with due care and diligence as exercised by that degree of skill ordinarily exercised in and about the City of Wallace, State of Idaho.

V.

Answering Paragraph V of plaintiff's Complaint, these defendants deny each and every allegation therein contained. Further answering said Paragraph V, these defendants allege that said surgery was prudently, carefully and with due medical diligence performed and carried out, and that these defendants exercised the required degree of skill in so doing. That if a needle, as alleged, was left

within the plaintiff, it was as a result of pure accident and not as a result of negligence.

VI.

Answering Paragraph VI of this Complaint, these defendants deny each and every allegation therein contained.

VII.

Answering Paragraph VII of plaintiff's Complaint, these defendants deny each and every allegation therein contained.

VIII.

Answering Paragraph VIII of plaintiff's Complaint, these defendants deny each and every allegation therein contained.

IX.

Answering Paragraph IX of plaintiff's Complaint, these defendants deny each and every allegation therein contained.

Affirmative Defense

I.

As affirmative defense these defendants allege that said plaintiff was never treated subsequent to March 26, 1951, for any complaint relative to said operation or surgery, and alleges that said defendants, Paul M. Ellis, Wallace Hospital and Lewis B. Hunter, never treated or saw said plaintiff for

any purpose within two years subsequent to March 26, 1951, and that said statute of limitations for the bringing and maintaining of said suit has run and did run on the 26th day of March, 1953.

Wherefore, defendants pray that said Complaint be dismissed, that the plaintiff take nothing and that these defendants have their costs and expenses herein incurred.

Dated this 20th day of February, 1958.

HAWKINS & MILLER,
/s/ By E. L. MILLER,
Attorneys for Defendants.

Duly Verified.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 22, 1958.

[Title of District Court and Cause.]

MOTION

Comes now the defendants in the above captioned matter and moves the Court and the Judge thereof in the above captioned matter as follows:

I.

Whereas, the defendants did heretofore under Rule 9F and Rule 12B 6 and Rule 56 move to dismiss the complaint herein for failure to state a claim upon the grounds that no relief could be granted in that said action was barred by the statute of limitations, and,

II.

Whereas, said Court did thereafter deny said motion without prejudice upon the grounds that there were allegations of continuing treatment, Now, Therefore, without waiving any of the rights of said defendants as appears from the records of said action and without waiving said prior motion, the defendants now move the Court as follows:

1. That evidence during the course of said trial now set for November 17, 1958, at 10:00 a.m. be restricted and limited to those acts and actions of the defendants, or any of them, which occurred within two (2) years from the institution of said suit being between the dates of July 30, 1955, and July 30, 1957.

2. Defendants further move that any right to recovery by the plaintiff herein be likewise restricted and predicated upon such acts and actions of negligence, if any, of said defendants and each and all of them within said period above set forth.

Dated this 3rd day of November, 1958.

HAWKINS & HAWKINS,
/s/ By E. L. MILLER,
Attorneys for Defendants.

Acknowledgment of Service Attached.

[Endorsed]: Filed November 4, 1958.

[Title of District Court and Cause.]

MINUTE ORDER
(Judge Clark)

(November 10, 1958)

This cause came on regularly this date in open court for hearing on defendants' motion for Restriction of Evidence and motion to publish all depositions, etc., James Ingalls appearing as counsel for the plaintiff and E. L. Miller appearing as counsel for the defendants.

After a discussion between the court and respective counsel, it was ordered that the motion to Restrict Evidence be overruled without prejudice and the motion to examine and publish all depositions be granted.

[Title of District Court and Cause.]

MINUTE ORDER
(Judge Clark)

(November 12, 1958)

This cause came on for further trial before the Court and jury; counsel for the respective parties being present, it was agreed that the jury panel and the alternate juror were all present.

After a statement of plaintiff's cause by its counsel, Elsie Summers was sworn and testified as a witness on the part of the plaintiff, and other evidence was introduced.

Comes now counsel for the defendants and moves

the Court for a directed verdict in favor of the defendants and against the plaintiff. Good cause appearing, the motion was granted. Thereupon, the Court directed the jury to find for the defendants and against the plaintiff, and the jury having done so, the Court ordered the verdict recorded, which was in the words following:

[Title of Court and Cause.]

VERDICT

"We, the jury, find for the defendants and against the plaintiff. Dated November 12, 1958. Chester E. Rich, Foreman."

Whereupon, judgment was entered in conformity with the verdict.

In the District Court of the United States for the District of Idaho, Northern Division

No. 2115

ELSIE SUMMERS, Plaintiff,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE, and LEWIS B. HUNTER, a co-partnership and HUBERT E. BONEBRAKE, M.D., individually,

Defendants.

JUDGMENT

This cause came on for trial before the Court and jury, both parties appearing by counsel, and

the Court on Motion of counsel for the defendants having directed the jury to render a verdict for the defendants, and the jury having done so,

It is Hereby Ordered, Adjudged and Decreed that plaintiff take nothing and that the defendants have and recover from the plaintiff its costs and disbursements incurred herein, taxed in the sum of $.....

Witness, The Honorable Chase A. Clark, Chief Judge of said Court, and the Seal thereof, this 12th day of November, 1958.

[Seal] ED. M. BRYAN,
Clerk,
/s/ By PAUL BOYER,
Deputy.

[Endorsed]: Filed November 12, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Wallace Hospital, Paul L. Ellis, Hubert E. Bonebrake and Lewis B. Hunter, a co-partnership, and Hubert E. Bonebrake individually, and E. L. Miller, Attorney for the Above-Named Defendants:

Notice Is Hereby Given that Elsie Summers, the plaintiff above named, does hereby appeal to the United States Circuit Court of Appeals for the

9th Circuit from the final judgment entered in this action on the 12th day of November, 1958.

Dated this 10th day of December, 1958.

DOEPKER & HENNESSEY,
JAMES W. INGALLS,
/s/ By JAMES W. INGALLS,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed December 10, 1958.

[Title of District Court and Cause.]

UNDERTAKING ON APPEAL

Whereas, Elsie Summers, the plaintiff in the above-entitled action, desires to appeal to the Circuit Court of the United States for the Ninth Circuit from a judgment entered against her in the said action on the 12th day of November, 1958, and to give an undertaking under Rule 73(B) of the Federal Rules of Civil Procedure,

The undersigned surety company, duly qualified as such under the laws of the State of Idaho, does hereby undertake under said statutory obligation and promise on the part of the appellant that said appellant will pay all costs that may be awarded against the said appellant on the appeal, or a dismissal thereof, not exceeding $250.00, to which amount it acknowledges itself bound.

In Witness Whereof, the said surety has caused these presents to be executed and its official seal attached, this 10th day of December, 1958.

[Seal] GLEN FALLS INSURANCE COMPANY,
/s/ By WILLIAM P. QUARLES,
Attorney-in-Fact.

State of Idaho,
County of Kootenai—ss.

On this 10th day of December, 1958, before the undersigned Notary Public in and for the said County and State, personally appeared William P. Quarles, known to me to be the Attorney-in-fact for the Corporation executing the foregoing instrument and acknowledged to me that on behalf of said Corporation he executed and affixed the seal of said Corporation to the said instrument.

[Seal] /s/ W. L. MARTIN,
Notary Public for Idaho, residing at Coeur d'Alene; Com. Exp. 6-20-60.

[Endorsed]: Filed December 10, 1958.

[Title of Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby

certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP):

1. Complaint
2. Motion to Dismiss
3. Order overruling motion to dismiss
4. Answer
5. Motion to limit evidence etc.
6. Minutes of the Court of Nov. 10, 1958 overruling Motion to limit evidence etc.
7. Minutes of the Court of Nov. 11, 1958
8. Minutes of the Court of Nov. 12, 1958, including Motion for a directed verdict and order granting said motion
9. Verdict
10. Judgment
11. Notice of appeal
12. Undertaking on Appeal
13. Statement of Points on Appeal
14. Order Extending Time for Appeal
15. Designation of Contents of Record on Appeal
16. Additional Designation of Record on Appeal
17. Transcript of Trial, including instructions to the jury for a directed verdict, and plaintiff's offer of proofs.
18. Deposition of Hubert E. Bonebrake, M. D.
19. Deposition of Dr. Paul M. Ellis
20. Deposition of Dr. R. W. Cordwell
21. Deposition of Elsie Summers
22. Amended Statement of Points on Appeal

In Witness Whereof I have hereunto set my hand and affixed the seal of said court this 27th day of January, 1959.

[Seal] ED. M. BRYAN,
Clerk.

[Title of District Court and Cause.]

DEPOSITION OF HUBERT E. BONEBRAKE, M.D.

Be It Remembered, pursuant to stipulation of counsel, the deposition of Hubert E. Bonebrake, M.D. was taken in the District Courtroom of the Shoshone County Courthouse, Wallace, Idaho on the 26th day of August, 1958 at the hour of 10:00 o'clock A.M., M.S.T. of said day. Present at the taking of said deposition were the following: Elsie Summers, plaintiff, with her attorneys of record, Mr. James W. Ingalls and Mr. M. J. Doepker; Hubert E. Bonebrake, deponent, with his attorney of record, Mr. E. L. Miller; Merle Myers, Deputy Clerk of the First Judicial District of the State of Idaho, before whom said deposition was taken, and Irene Vermillion, Court Reporter, who took said deposition down in shorthand and later transcribed the same into typewriting.

Whereupon the following proceedings were had and done, to wit:

Mr. Doepker: It is hereby stipulated, by and between the [1]* plaintiff, Elsie Summers, and the

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* Page numbers appearing at bottom of page of Original Deposition.

(Deposition of Hubert E. Bonebrake, M.D.)
defendants, Wallace Hospital, Paul M. Ellis, Hubert E. Bonebrake and Lewis B. Hunter, a co-partnership, and Hubert E. Bonebrake, M.D., individually, defendants, stipulating by and through their respective counsel of record, James W. Ingalls and M. J. Doepker and Maurice F. Hennessey, a law firm doing business and practicing in Montana under the name and style of Doepker and Hennessey, that the deposition of Dr. Hubert E. Bonebrake and Dr. Paul M. Ellis may be taken before the Deputy Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, at the hour of 10:00 o'clock A.M. of August 26, 1958 and continuing thereafter until said deposition is completed; that the deposition will be taken upon oral interrogatories directed to the defendants whose depositions are being taken and the interrogatories so propounded may be subject to any objections whatsoever upon the trial of the action to the same effect as if the witness were personally present and testifying therein, with the exception that objections as to the form of the interrogatories must be taken at the time of the taking of the deposition.

That said depositions are taken on behalf of plaintiff for the purpose of discovery and for the purpose of use at the trial or for any other purpose, particularly with respect to the right to use the deposition upon cross examination of the defendant without the plaintiff being bound by the testimony [2] thus given under the rules of Federal Proce-

(Deposition of Hubert E. Bonebrake, M.D.)

dure of this particular proceeding. And on behalf of the plaintiff, Elsie Summers, she is present here in the courtroom at the time of the taking of these depositions and by her counsel and, if required, on her own behalf, will waive any claim of privity or privilege between herself and any of the defendants with respect to the defendants as physicians and surgeons testifying upon any matter disclosed by reason of the professional relationship of doctor and patient and the plaintiff hereby offers to sign such waiver as may be required by the defendants in that particular.

That when said depositions are taken any exhibits that may be produced or offered in evidence at the trial may be included with the depositions or placed separately in an envelope so that contact prints of X-rays may be made by the Clerk of the District Court of Idaho in Boise, Idaho and that photographs of the exhibits may be prepared from any exhibits that may be offered at the time of taking such depositions and that they likewise may be separately enclosed for the same purpose of making copies so that after their use upon the trial, copies of the records may be substituted for the originals and, if deemed necessary, the originals may be returned to the records and files of the Wallace Hospital or the records and files of the defendants.

After said depositions are taken the defendants shall have the right to examine said depositions and to make any corrections [3] that they may deem appropriate after having examined the depositions,

(Deposition of Hubert E. Bonebrake, M.D.)

provided that such correction shall be separately listed and stated and signed in connection with the original deposition. That said depositions may be used by either party upon any trial or proceedings had in connection with the cause on trial, the title of which is included as a part of the depositions.

That the witnesses may be sworn by the Deputy Clerk of the Court in attendance and after said depositions are taken by the reporter, the same shall be transcribed by her and the depositions properly verified by the Deputy Clerk of the District Court according to the practice and rules of Federal Procedure and of the rules of the District Court of the District of Idaho.

Mr. Miller: I accept the stipulation.

HUBERT E. BONEBRAKE

called as a witness by plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Doepker): Will you please state your name, sir? A. H. E. Bonebrake.

Q. What, if any, business or profession are you engaged in at the present time?

A. I am a physician and surgeon.

Q. You are duly licensed to practice your profession in [4] the State of Idaho? A. I am.

Q. And are a graduate of what school?

A. University of Oregon Medical School.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. How long have you been practicing your profession in Wallace, Doctor? A. 21 years.

Q. Did you practice elsewhere besides in Wallace, Idaho? A. No.

Q. What is your specialty?

A. I have no specialty.

Q. Then you follow general practice, do you?

A. I do.

Q. And that includes surgery, does it?

A. It does.

Q. Have you practiced surgery in the State of Idaho besides here in Wallace? A. No.

Q. Do you practice surgery in the hospitals in the Coeur d'Alene district?

A. Just one hospital.

Q. Just the Wallace Hospital? A. Yes.

Q. Then directing your attention to the plaintiff here, Elsie Summers, who is seated here in the courtroom at this time, [5] was she at any time in the past your patient? A. Yes.

Q. And when did that doctor-patient relationship originate, please, if you recall?

A. March 14, 1951.

Q. March 14, 1951. In what hospital were you engaged in surgery? A. Wallace Hospital.

Q. We observe in the Answer which has been filed here by the defendants that an allegation which the plaintiff made in her complaint to the effect that the defendants, Paul M. Ellis, Hubert E. Bonebrake and Lewis B. Hunter were, are and continued to be the co-partnership engaged in busi-

(Deposition of Hubert E. Bonebrake, M.D.)

ness at Wallace in the State of Idaho of operating and conducting a hospital for the care and treatment of human beings who are ill or in need of medical care, hospital and surgery, X-ray and services and said defendants are thus engaged and duly licensed and using the name and style of Wallace Hospital. Is there something in those allegations that are incorrect, doctor? A. Yes.

Q. Will you please indicate what they are?

A. We were a partnership at that time. That allegation says we still are and continue to be. Dr. Hunter is no longer a partner.

Q. Then at the time involved, the inception of this treatment [6] of the plaintiff, you were a partnership at that time, were you? A. Yes.

Q. Dr. Hunter, is he no longer practicing medicine in Wallace or is he here?

A. That's right, he is not here.

Q. Where is Dr. Hunter at the present time?

A. Spokane, Washington.

Q. In view of your answer, Doctor, to the effect that your first contact with the plaintiff, Elsie Summers, in the capacity of physician and patient was in the year 1951, I presume that you do not, at this time, have an independent recollection of the details of that episode, do you? From your own memory, I mean. Is that correct?

A. I have a recollection.

Q. Do you think you have a recollection of all the details of it or would your mind be refreshed by the use of records that were kept at the time?

(Deposition of Hubert E. Bonebrake, M.D.)

A. I have a recollection of most of the details, however, I may have to use records for some of the details.

Q. May I inquire, please, whether you have here in court or whether you have here in Wallace records, that is, particularly the hospital records of the episode referred to in March of 1951?

A. I do.

Q. And the records that you have here, are they all of the [7] records connected with the matter of your surgical and doctor treatment of the plaintiff at that time? A. Yes, they are.

Q. And do you have, in your office or elsewhere, any other records that you have not produced here in court in connection with this case?

A. I have no other records.

Q. Will you kindly produce the hospital records that you have in court with you at this time so that they may be marked for identification?

Mr. Miller: Are you referring to records of 1951 or all records?

Mr. Doepker: All the records all the way through, we are starting at this time with the 1951 records.

Mr. Miller: All right.

Q. Doctor, you have produced here in connection with your examination, an envelope upon which has been marked Hospital No. 51-254 and the patient's name as Mrs. Lee Summers and the date of admission, March 15, '51 and the date of discharge, March 18, '51 and the name of the physician, H. E. Bone-

(Deposition of Hubert E. Bonebrake, M.D.)

brake, that envelope containing a series of hospital sheets entitled personal history, Doctor's orders, nurse's record, graphic chart, laboratory records, nurses records, anesthetic report; for the purpose of having these identified we will ask that the reporter now mark the envelope and the contents with a significant mark such [8] as D-1, and as to the pages, separate pages of the record, some identification such as 1-A.

(Plaintiff's Exhibit D-1, D-1A, D-1B, D-1C, D-1D, D-1E, D-1F, D-1G, D-1H, D-1I, D-1J, hospital records under hospital No. 51-254, marked for identification by reporter.)

Q. Now, again calling your attention, Doctor, to the envelope and contents which has been identified as Plaintiff's Exhibit D-1 for the purpose of identification, will you please examine the contents of the envelope and the various pages that have been indicated by the letters A to J inclusive, please, and state what those are?

A. D-1A is personal history record of Mrs. Lee Summers taken on March 15, 1951.

Q. All right, Doctor, in connection with that you have her listed here as Mrs. Lee Summers. Do you know whether or not she is the same person as Elsie Summers or the lady at least that is in the courtroom? A. This is the same individual.

Q. You were starting to identify the various pages of the record.

A. D-1B is Doctor's order sheets during her hospital stay; D-1C is a page of nurse's notes; D-1D is

(Deposition of Hubert E. Bonebrake, M.D.)

a laboratory record; D-1E is a graphic chart of temperature, pulse and respiration; D-1F is pathologist's report; D-1G is another page of nurse's notes; D-1H is a page of nurse's notes; D-1I is an anesthetic [9] report for March 16; D-1J is an anesthetic report for March 17.

Q. Were each and all of those records kept of your patient, Mrs. Lee Summers or Elsie Summers in the Wallace Hospital at the date that they purport to be, that is, to wit, the 15th of March, 1951 until the 18th of March, inclusive, 1951?

A. I don't understand your question.

(Question read by reporter.)

A. To my knowledge they were kept in the hospital all that time.

Q. She was your patient, is that right, all that time? A. Yes.

Q. And you were in charge of her case, is that right? A. Yes.

Q. And in the usual practice and course of business of the hospital these records were kept, isn't that true, Doctor, these were kept in the usual course of business of the hospital?

A. What do you mean by kept?

Q. You have them here?

A. You mean records were made at that time?

Q. Yes. A. Yes.

Q. Made and kept at the time they show on their face that they were kept, isn't that right?

A. Yes.

Q. And as far as you were able to tell they were

(Deposition of Hubert E. Bonebrake, M.D.)

correctly [10] kept, were they not, the records were kept correctly?

A. They were kept correctly, yes.

Q. We will offer then Plaintiff's D-1 and contents thereof in evidence.

Mr. Miller: My understanding of the rule is the offer is made now but admitted at the time of trial.

Q. What other records do you have of the hospitalization in March of 1951, Doctor, please?

A. Here is the record for Mrs. Lee Summers for March 25 through April 2, 1951.

Q. That likewise is kept in an envelope with the number 51-254, is that correct?

A. No, that is not correct, it is not the same number.

Q. I am sorry, it is a different number, 51-294.

A. Yes.

Q. The previous one being 51-254. Will you please examine the various sheets, Doctor, and state whether or not they are part of this record in Hospital No. 51-294, first for the purpose of identification, I don't want you to say what they are at this time. May the record show that we now ask to have the envelope and contents marked in the same manner as the previous envelope and contents were marked by the reporter.

(Plaintiff's D-2, D-2A, D-2B, D-2C, D-2D, D-2E, D-2F, D-2G, D-2H, D-2I, D-2J, D-2K, D-2L, D-2M, D-2N, D-2O, D-2P, envelope and contents, Hospital No. 51-294, marked for identification by [11] reporter.)

(Deposition of Hubert E. Bonebrake, M.D.)

Q. Now, then, Dr. Bonebrake, please, directing your attention to Plaintiff's Exhibit D-2 for identification and the sheets of records and so on contained in the envelope, will you please examine each and every one of those sheets and state, please, what they are?

A. D-2A is Doctor's orders during her stay at the hospital; D-2B is continuation of Doctor's orders; D-2C is a graphic chart of her temperature, pulse and respiration; D-2D is continuation of this record; D-2E is the pathologist's record; D-2F is the anesthetic report; D-2G is the personal history record; D-2H is the laboratory record; D-2I is a page of nurse's notes; D-2J, another page of nurse's notes; D-2K, page of nurse's notes; D-2L, a page of nurse's notes; D-2M, page of nurse's notes; D-2N, a page of nurse's notes; D-2O, page of nurse's notes and D-2P, a page of nurse's notes.

Q. Were these records, which you have just identified, Dr. Bonebrake, records that were kept of this patient in the Wallace Hospital at the time of the episode between the 25th of March, 1951 and the 2nd of April, 1951? A. Yes.

Q. And were those kept in the regular and usual course of the operation of the hospital?

A. Yes.

Q. And with you in charge of the patient that was involved at the time? [12] A. Yes.

Q. As far as you know they were correctly kept also?

A. As far as I know they were correctly kept.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. May we inquire then, please, Doctor, if you have further records of the patient, Elsie Summers, otherwise known as Mrs. Lee Summers, in connection with the Wallace Hospital and your treatment of her? A. I do.

Q. Do you have those with you there at the moment? A. Yes.

Q. May we see them, please? Just for the purpose of preliminary identification, will you please just casually look those over and see whether they are part of the hospital record, No. 52-410?

A. I am sorry, the number is 52-710.

Q. I attribute the error to my inability to read figures. Let the record show the plaintiff requests that the envelope and contents relating to Mrs. Lee Summers, being 52-710, and the envelope and inclusions be marked for identification as has been done previously with other exhibits.

(Plaintiff's Exhibit D-3, D-3A, D-3B, D-3C, D-3D, D-3E, D-3F, D-3G, D-3H, envelope No. 52-710 and contents, marked for identification by reporter.)

Q. Directing your attention, Doctor, to the Hospital No. 52-710 and inclusions, will you please examine the inclusions [13] and relate what they are, please?

A. D-3A is Mrs. Lee Summers personal history record; D-3B, Doctor's orders, D-3C is an itemization of her clothing and personal effects when she came to the hospital; D-3D is a page of nurse's notes; D-3E is a page of nurse's notes; D-3F is a

(Deposition of Hubert E. Bonebrake, M.D.)

graphic chart of temperature, pulse and respiration; D-3G is her laboratory record; D-3H is her X-ray report.

Q. And with respect to Plaintiff's Exhibit D-3 and the contents that you have related, are these records that were kept of this patient at the Wallace Hospital at the time that is indicated upon the various sheets that the records were made at the time indicated, 1952? A. That is correct.

Q. And were they likewise kept in the usual course of the operation and business of the hospital? A. They were.

Q. And correctly kept to your knowledge as far as you could know?

A. To my knowledge, yes.

Q. I don't know if we have previously indicated an offer, I want to be sure we did and likewise offer Plaintiff's Exhibit D-3. Do you have further records, Doctor, of Mrs. Lee Summers?

A. I do.

Q. Will you produce the rest, please? We will please ask the reporter to mark hospital envelope No. 54-901, Mrs. Lee [14] Summers (Elsie) and the contents the same as has been previously done with respect to the other three records.

(Plaintiff's Exhibit D-4, D-4A, D-4B, D-4C, D-4D, D-4E, D-4F, Hospital Envelope No. 54-901, marked for identification by reporter.)

Q. Directing your attention again, Doctor, please, to Plaintiff's Exhibit D-4 and the sheets

(Deposition of Hubert E. Bonebrake, M.D.)
that are enclosed, will you please examine them and relate to us what they are, please?

A. D-4A is personal history record of Mrs. Lee Summers during her stay in the hospital in November 29, 1954; D-4B is a Doctor's order sheet; D-4C is a graphic chart of her temperature, pulse and respiration; D-4D is laboratory record; D-4E is page of nurse's notes; D-4F is a page of nurse's notes.

Q. And as we have previously inquired, Doctor, does Plaintiff's Exhibit D-4 for identification contain a record that was kept of your patient, Mrs. Lee or Elsie Summers, in the Wallace Hospital under the dates that are shown upon the record?

A. That is correct.

Mr. Miller: I wish to interject an objection to the form of the question and particularly the words "your patient." I think the record speaks for itself and the person was a patient of Dr. Gnaedinger.

Q. What, if any, connection does Dr. Gnaedinger have with the Wallace Hospital at that time in 1954, Doctor?

A. In 1954 he was a member of the Wallace Hospital staff. [15] At about that time he was taken in as a partner. I am not sure he was a partner at that time or an employed individual. However, I could look up the record.

Q. Whether or not he was a partner, he was one of the physicians at the Wallace Hospital at that time? A. Yes.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. And at the present time is he available in Idaho, is he here? A. Yes, he is here.

Q. Here in Wallace? A. Yes.

Q. And still connected with the Wallace Hospital? A. Yes, he is.

Q. Are you familiar with this record in any way? A. I have looked it over.

Q. But at the time of this episode in the hospital, were these matters called to your attention?

A. I don't recall at the time they were ever called to my attention.

Q. Had there been any reason why Mrs. Summers, who had previously been your patient, should have been referred to another doctor at that time?

Mr. Miller: I am going to object to the form of the question.

Q. That you know of? [16]

Mr. Miller: Object to the form of the question as speculative and calling for the conclusion of the witness and not proper examination. You have to answer, Doctor, if you can.

A. She was not referred to another Doctor. We had a system at the hospital in which we always have one doctor available and she came in, I believe, at night and it was a night that Dr. Gnaedinger was on call, as we say.

Q. OK. A. So he took care of her.

Q. As to the contents of the record that is shown here you don't have any independent knowledge about this episode in the hospital, is that correct, you did not have at the time? A. No.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. When did you first become acquainted with the record, if at all, subsequent to these dates?

A. I knew she was in there and had talked to Dr. Gnaedinger at the time but that was the extent of my contact.

Q. We will, after the proper foundation and opportunity to call Dr. Gnaedinger, ask to have this record introduced in evidence also. Now, do you have further records? Will you make a brief examination of the contents of Hospital No. 56-141 just preliminary to identifying them. May the record show that we request, please, that the Hospital No. 56-141 and the contents be marked as has been previously done with the other Exhibits, D-1 through D-4 inclusive. [17]

(Plaintiff's Exhibit No. D-5, D-5A, D-5B, D-5C, D-5D, D-5E, D-5F, D-5G, D-5H, D-5I, Hospital record envelope No. 56-141 and contents, marked for identification by reporter.)

Q. Now, directing your attention to Hospital No. 56-141, Mrs. Arthur Lee Summers (Elsie) and contents of the envelope, will you please look them over and identify them, Doctor?

A. No. D-5A is personal history and physical examination record; D-5B is progress record; D-5C is the operation record; D-5D is the doctor's orders; D-5E is the laboratory record; D-5F is graphic chart of temperature, pulse and respiration; D-5G is page of Nurse's notes; D-5H is a page of nurse's notes; D-5I is a page of nurse's notes.

Q. The records enclosed in the envelope and the

(Deposition of Hubert E. Bonebrake, M.D.)
envelope are of Mrs. Elsie or Mrs. Lee Summers, your patient, are they kept in the usual course and practice at the Wallace Hospital upon the dates indicated? A. They were.

Q. And do they likewise correctly show the records that are depicted upon the various pages, they show the record of what is contained upon the various pages? A. They do.

Q. And they do so correctly, do they not?

A. To my knowledge.

Q. To the best of your knowledge. We will offer in evidence then Plaintiff's D-5. Do you have any further of those [18] type of records, Doctor?

A. No.

Q. What other records of the plaintiff do you have besides these?

A. We have our X-ray file.

Q. Is that available? A. Yes.

Q. May we have it please? Are a group of negatives that you have handed to counsel at this time negatives of X-rays taken in the Wallace Hospital of the plaintiff, Elsie Summers, over a period of time? A. They are.

Mr. Miller: Do you have any objection to marking those in date sequence?

A. They are all mixed up now.

(X-rays sorted by doctor.)

Q. May the record show that Dr. Bonebrake has now assembled a series of X-rays negatives in some order, chronological order I presume, which will

(Deposition of Hubert E. Bonebrake, M.D.)

permit the reporter to number the exhibits in sequence as they have been presented.

(Plaintiff's Exhibits D-6, D-7, D-8, D-9, D-10, D-11, D-12, D-13, D-14, D-15, D-16, D-17, D-18, D-19, D-20 marked for identification by reporter, X-rays.)

Q. Dr. Bonebrake, calling your attention to an X-ray negative that has been marked by the reporter during the brief [19] recess as Plaintiff's proposed Exhibit D-6 as of August 1, '52. Will you examine it, please, and state what it is?

A. This is an X-ray of Mrs. Lee Summers' abdomen taken August 1, 1952.

Q. What identification does the X-ray have on its face, Doctor, please?

A. There is a small X-ray plate which gives her name and the date, my initial and the X-ray number in the upper left hand corner.

Q. Then I assume that also upon the negative appears a letter, capital "R," is that right?

A. That's right.

Q. What does that indicate?

A. That indicates that is the right side of her abdomen.

Q. That would indicate the X-ray picture, or whatever you term it, was taken with the patient in what position? What position would she be, can you tell from the plate itself?

A. It is difficult to tell from the plate itself but I am quite sure it was taken either with her lying on her back or abdomen.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. But as to whether or not it would be one or the other you are not in position to state?

A. I am not in position to state but I believe the usual practice the picture would be taken lying on the back.

Q. Then the X-ray was taken by you or under your supervision [20] or how?

A. Taken by the technician at the hospital.

Q. I see and the apparatus that was used to take the picture was what type?

A. Mattern X-ray machine.

Q. Is that an X-ray machine that is approved by the medical profession, at least in the vicinity of Wallace, Idaho, as being an X-ray machine that would correctly depict the objects to which the photographic apparatus was directed? A. It is.

Q. What was the moving factor which caused the taking of this X-ray plate, Doctor?

A. Abdominal pain.

Q. Have you examined this X-ray in a shadow box so that you could tell what, if anything, was shown in it in the nature of pathology?

A. I have.

Q. Did you find anything, did you see anything in it?

A. Nothing except some dilated loops of gas in the bowel.

Q. And at the time this was taken by the technician, did you go into consultation with the technician concerning it?

(Deposition of Hubert E. Bonebrake, M.D.)

A. I don't recall I went into consultation about it.

Q. Did he furnish you a report after taking the X-ray? A. No, he didn't.

Q. At least you don't have any report from the technician [21] himself?

A. Not from the technician.

Q. Do you have a report separate on this X-ray? A. I do.

Q. That is in the file?

A. It is already there.

Q. The field of the X-ray is from the ribs down along the spine to and including the pelvis, is that right? A. Yes.

Q. Were there any other X-rays taken on this occasion at the time, the 1st of August, 1952?

A. No.

Q. Calling your attention to Plaintiff's proposed Exhibit D-7, what, if anything, does this X-ray show?

A. D-7 is an X-ray of Mrs. Lee Summers gall bladder taken January 6, 1953.

Q. And is it likewise identified by an identification that appears in the film itself?

A. It is.

Q. Showing the name of the patient and the date, is that correct? A. It is.

Q. This exhibit was taken with an identical type of machine, was it?

A. It was taken with the same machine. [22]

Q. Would you say both exhibits we have re-

(Deposition of Hubert E. Bonebrake, M.D.)

ferred to thus far correctly depict what they are purported to be directed at as far as X-ray technique is concerned? A. They do.

Q. Did you find any pathology in this X-ray?

A. No, I did not.

Q. Directing your attention to Plaintiff's proposed Exhibit D-8, will you state what that is, Doctor, please?

A. That is another gall gladder X-ray taken on January 6, 1953 of Mrs. Lee Summers.

Q. Did you find anything in the nature of pathology in that film, Doctor?

A. No, I didn't.

Q. Directing your attention to Plaintiff's proposed Exhibit D-9, will you state, please, what that is?

A. This is another gall bladder X-ray of Mrs. Lee Summers Taken January 6, 1953.

Q. And with respect to that—or might I ask a general question. Were all these X-ray negatives taken by the X-ray machine you have previously named and described? A. They were.

Q. Did you find anything in the nature of pathology in this X-ray? A. I did not.

Q. Calling your attention to Plaintiff's proposed Exhibit [23] D-10, will you examine it, please, and state what it is?

A. This is an X-ray of Mrs. Lee Summers' hand taken June 9, 1953.

Q. You have already answered they were taken

(Deposition of Hubert E. Bonebrake, M.D.)

on the same machine. Did you find any pathology in this? A. I did.

Q. What was it?

A. A comminuted fracture of the second phalanx of the left ring finger.

Q. Is that indicated on the film, sir?

A. It is.

Q. Directing your attention to Plaintiff's Exhibit D-11, will you examine it, please, and state what it is?

A. This is an X-ray of Mrs. Lee Summers' pelvis taken February 20, 1956.

Q. This X-ray is taken lower down than that of X-ray Exhibit D-6, is it not? A. Yes.

Q. It shows the hip articulation with the pelvis?

A. It does.

Q. And in the vicinity of that area between the two hip bones, do you find something in the X-ray there, Doctor, some metallic substance?

A. The X-ray shows the shadow of what appears to be a surgical needle. [24]

Q. Will you describe or tell us in what area this surgical needle appears to be, if you can, from the X-ray.

A. I cannot tell you from this one X-ray.

Q. Do you know whether this X-ray has been marked as to right and left or not?

A. I don't see any marking identifying right and left.

Q. Now, directing your attention to Plaintiff's

(Deposition of Hubert E. Bonebrake, M.D.)

proposed Exhibit D-12, will you examine it, please, and state what it is?

A. This is a lateral X-ray of Mrs. Lee Summers' pelvis taken February 20, 1956.

Q. By a lateral it would be from side to side?

A. That's right.

Q. As to which side it was taken, you couldn't tell. Do you find any evidence of this object that you have described as possibly a surgical needle in this X-ray? A. I do.

Q. Where do you find it, Doctor?

A. It is lying anterior and superior to the symphysis pubis.

Q. And by that you mean it is in front and above, is that what you mean by anterior and superior or what? A. Correct.

Q. Calling your attention to Plaintiff's proposed Exhibit D-13 I will ask you to examine it, please, and state what that is, Doctor? [25]

A. This is another X-ray of Mrs. Lee Summers' pelvis taken February 20, 1956.

Q. Would be a period of approximately two weeks subsequent to the others?

A. The same day.

Q. Oh, the same day. What, if anything—you still find something of an unusual nature in that X-ray?

A. The same foreign body is seen lateral to the mid line on the right side.

Q. And that line is indicated upon the X-ray plate, is it not, by the capital letter "R"?

(Deposition of Hubert E. Bonebrake, M.D.)

A. It is.

Q. Then calling your attention to Plaintiff's Exhibit D-14 of the same date, will you state what that is, please, Doctor?

A. This is a lateral X-ray of Mrs. Lee Summers' pelvis taken February 20, 1956.

Q. Does it disclose anything of an unusual nature?

A. It discloses a foreign body one and a half inches anterior to the symphysis pubis.

Q. With respect to the other diagnostic or X-rays that were taken for the purpose of discovery, is it in the same relative position in all the X-rays? I mean, does it appear to be in the same relative position, has it changed in any way?

A. This X-ray is upright lateral taken with the patient [26] standing and it has changed a little bit, it has dropped down.

Q. And the right is also shown on this film, is it not? The right is also indicated on this film?

A. There is an "R" on the film indicating the right side of the patient was to the X-ray plate.

Q. Calling your attention to Plaintiff's Exhibit D-15, what, if anything, does that X-ray disclose, on what part of the patient's body is that taken of?

A. This is another lateral X-ray of Mrs. Lee Summers' pelvis.

Q. Taken the same day?

A. Taken February 20, 1956.

Q. Does it also disclose a foreign body somewhere in the film? A. It does.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. And what relative position is shown there?

A. This shows the foreign body to be anterior to the symphysis pubis and superior.

Q. I am unable to identify, is this a shift?

A. This is not a shift, it is the femurs superimposed one upon the other.

Q. Calling your attention to Plaintiff's Exhibit D-16, will you examine it, please, and indicate what that is?

A. This is another X-ray of Mrs. Lee Summers' pelvis taken February 20, 1956. [27]

Q. Does it likewise show a foreign body in a relative position similar to the others?

A. It does.

Q. Now, calling your attention to Plaintiff's Exhibit D-17, what, if anything, is this X-ray taken of, Doctor?

A. This is a lateral X-ray of Mrs. Lee Summers' anterior pelvis, all not shown on here, taken February 23, 1956.

Q. Does that show any, is there any evidence of a foreign body shown in that X-ray?

A. There is.

Q. And in the same relative position or approximately relative position as the others or having moved?

A. It is in approximately the same relative position as the others.

Q. Calling your attention to Plaintiff's Exhibit D-18, I will ask you to examine it, please, and state what it is?

(Deposition of Hubert E. Bonebrake, M.D.)

A. This is another X-ray of Mrs. Lee Summers' pelvis, a lateral view taken February 23, 1956. This is an anterior pelvis.

Q. Does it show any metallic substance at all in it, or what is this? I am indicating a hook like substance?

A. It shows, besides the previously described foreign body, a catheter which has been placed in her bladder and also two steel needles which have been placed in the area of the foreign body.

Q. Was this taken during the course of some operative [28] procedure?

A. Preliminary to.

Q. Calling your attention to Plaintiff's Exhibit D-19, what, if anything, is shown in that exhibit?

A. This is anterior-posterior X-ray of Mrs. Lee Summers' pelvis taken February 23, 1956.

Q. And is that taken also preliminary to operative procedure? A. It was.

Q. Showing the catheter and some other substance there in connection with the foreign body?

A. It does.

Q. I observe, apparently, a sac of some kind?

A. Those are the bases of two long needles which were placed in this area to identify the object.

Q. To identify the object and its position or just identify the object?

A. Identify the object and position.

Q. Directing your attention now finally to Plaintiff's proposed Exhibit D-20, what, if any-

(Deposition of Hubert E. Bonebrake, M.D.)
thing, is disclosed in that exhibit or on it, sir?

A. It is another anterior-posterior X-ray of Mrs. Lee Summers' pelvis taken February 23, 1956.

Q. Likewise having some object directed toward the foreign body? [29] A. Yes.

Q. Now, do you have any further X-rays subsequent to this date? A. No.

Q. May I inquire, please, now, Doctor, do these exhibits that have been presented here by you contain a complete record so far as the Wallace Hospital and yourself are concerned respecting the patient, Elsie Summers or Mrs. Lee Summers?

A. No.

Q. Do you have some other records, something else besides what we have here? A. I do.

Q. Do you have those with you A. Yes.

Q. You have some further records?

A. I do.

Q. May we have them? You have now handed counsel a series of cards upon which there appears writing, generally, will you state what these cards represent?

A. Those cards are the clinical office record of Lee Summers, Mrs. Lee Summers and their family.

Q. And with respect to the various cards that are involved, which ones are related to Mrs. or Elsie Summers? A. All of them.

Q. All of them. [30]

(Plaintiff's Exhibits D-21, D-22, D-23, clinic cards, marked for identification by reporter.)

Q. Directing your attention now, Doctor, to one

(Deposition of Hubert E. Bonebrake, M.D.)

of the cards which you have presented, being Plaintiff's proposed Exhibit D-21, for the purposes of identification, what does that represent, please, Doctor?

A. D-21 is a clinic record representing the office calls of Mr. Lee Summers, Mrs. Lee Summers and their children from 1947 through March, 1951.

Q. Are these cards kept in the office records of the hospital?

A. They are kept in the office records of the clinic part of the hospital.

Q. The clinic part of the hospital, I see, and kept, I presume, by somebody that has charge of keeping the records, the clinic records?

A. Yes.

Q. Is that true of Plaintiff's Exhibit D-22 and Plaintiff's Exhibit D-23? You may examine them.

A. Yes.

Q. Now, with respect to this, is that some separate or different record?

A. This is a record of a special examination Dr. Hunter made of Mrs. Lee Summers.

(Plaintiff's Exhibit D-24, clinic record, marked for identification [31] by reporter.)

Q. And now the four cards, as you have testified, relate to the Summers family including the plaintiff, Elsie Summers, is that right?

A. Yes.

Q. As kept in the clinic, the clinic portion of the hospital, the office? A. Yes.

Q. Were these, any of these used by you in your

(Deposition of Hubert E. Bonebrake, M.D.)

treatment or diagnosis of Elsie Summers, were these cards used by you? A. They are.

Q. In your diagnosis and treatment of her during the time she has been your patient?

A. Yes.

Q. Now then, Doctor, do we have a complete record of the records of Wallace Hospital with respect to the plaintiff, Elsie Summers?

A. Yes.

Q. Going back to the inception of your contact or treatment of her in March of 1951, what was the occasion of you being called to attend her at that time?

A. She came to see me complaining of abdominal pain, low back pain and continuous bloody vaginal discharge, her last period having been February 8, 1951.

Q. In connection with this reason for her coming to see [32] you, did you obtain a history from her other than what you have now related?

A. Yes.

Q. After having obtained that history was there indicated to you further treatment by you or further examination by you at that time?

A. There was.

Q. And what, if anything, then did you do in connection with what you had learned up to this point?

A. She was advised, after examination, that she very likely had a tumor growing in her uterus. She was rather an obese individual, to find out for sure

(Deposition of Hubert E. Bonebrake, M.D.)
about this she was advised to be examined under an anesthetic which was done two days later.

Q. Then you made a physical examination of the part which you believed to be affected at the time, is that correct? A. I did.

Q. Then after having done so, what, if anything, did you discover concerning this examination?

A. When examined under anesthetic she was found to have a nodule growing on the right side of her uterus approximately two to three centimeters in diameter. As I say, she is rather an obese individual and this examination is quite difficult under those circumstances. She was advised that this thing could be a benign tumor, it could be malignant tumor or cancerous tumor or it possibly could be a pregnancy in the wrong place. [33]

Q. And pregnancy in the wrong place, is that sometimes known as ectopic pregnancy?

A. That's right.

Q. So these preliminary examinations which you made laid the foundation for your making further treatment of the patient, did it not?

A. It did.

Q. And then did you proceed further with the treatment of Elsie Summers at that time?

A. After the examination under anesthetic she was again told that a scraping or currettement of the uterus should be made to find out whether there was pregnancy present, whether cancer or just a benign tumor. The report came back on that, "normal uterine tissue," you might say.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. So did that report indicate to you that at least so far as that examination had gone, there was no malignancy present?

A. Up to that point we could say as far as this shows, we can't definitely tell you you have malignancy but it did not rule it out.

Q. And as a matter of fact the malignancy, that is, possible malignancy was taken into consideration at that time, a possibility?

A. It was taken in consideration from the very onset.

Q. That is what I mean, up to this time, Doctor, the [34] examination you made. Then proceeding further with your examination and treatment of the patient, what was indicated by this, what needed to be done for the benefit of the patient?

A. After we got the reports back we knew we had a patient who was bleeding, who had a mass growing in her uterus. We felt currettement had pretty well ruled out pregnancy. Those tissues are examined by an expert at the University of Oregon Medical School. She still had a tumor. She was advised this should be removed.

Q. In furtherance of that advice, did Mrs. Summers arrange to have the tumor removed, or have whatever surgery was necessary or indicated at the time? A. She did.

Q. And did she leave the method of operation or what was necessary to be done up to you as her physician at that time? A. She did.

Q. And then in furtherance of this examination

(Deposition of Hubert E. Bonebrake, M.D.)
and diagnosis at the time, did you perform surgery finally upon Elsie Summers? A. I did.

Q. Will you relate, please, what was done in connection with this surgery in some detail, please, Doctor?

A. Under general anesthetic through midline abdominal suprapubic incision, this is an incision between the pubic area and navel, her abdomen was explored; her uterus was found to be [35] about twice normal size, and, in the right upper part of the uterus where the Fallopian tube comes in, there was a mass two or three centimeters in diameter. The uterus and both tubes appeared scarred. The uterus in its entirety, that includes what we call the cervix or mouth of the womb, was removed. The appendix was also removed. That is common procedure if the appendix is lying there, we take it out.

Q. And that is if it appears to be indicated by examination you remove it?

A. We remove it very frequently.

Q. Is there anything about that particular portion of the operation that makes it any more difficult from a physician's standpoint, that is, removal of the appendix in that fashion?

A. Not ordinarily.

Q. It is just another portion of the patient's anatomy that was indicated to you as her doctor should be removed and was removed, is that right?

A. That's right.

Q. In the process of this surgery? What else was done in the way of any surgical procedure?

(Deposition of Hubert E. Bonebrake, M.D.)

A. A repair of her vaginal wall was done. This we call a perineorrhaphy.

Q. This you have related, does that generally take care of the operative procedure that was performed at this time in March of 1951? Is that a pretty complete relation of what was [36] done at that time? A. Yes.

Q. In a general way. Now, after these portions of the patient's, that is, plaintiff's anatomy were surgically removed, what was necessary to be done with the suturing or closing up the incisions that have been made. What was necessary to do then?

A. I don't understand your question.

Q. Making it more direct, was it necessary to sew, in common parlance, to sew up the parts, what was left after the remaining parts had been removed?

A. After the uterus and tubes and appendix were removed, part of that procedure is to sew up all blood vessels which might bleed, close off ligaments which hold the uterus in place and sew up the top of the vagina to other tissue in the pelvis and cover it over with peritoneum which is the lining of the abdomen. After that the wound is closed and this is closed in three layers. First the peritoneum or lining of the abdomen is closed, then the tough, fibrous, what we call fascia is closed and then the skin.

Q. That is relating the closure from the interior portion outward, is it not, out to the surface of the skin? A. Yes.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. Now in that procedure, was this operation performed in a single operative procedure or was it done in sections at [37] different times? Was it all done at the same operative procedure or same surgery?

A. It was all done under the same anesthetic. There were two surgical setups required, one for vaginal work, one for abdominal work.

Q. Did that require another opening of the abdominal wall or the pubic wall to perform that other operation or was it done with the one opening?

A. The hysterectomy was done with one opening in the abdomen; the vaginal repair was done from below with an incision at the mouth of the vagina.

Q. Now, in this procedure that was followed at that time, did you employ any surgical needles?

A. I did.

Q. And in this particular case, the sewing that was done, using common parlance, was done with one or more types of surgical needles?

A. More types of surgical needles?

Q. More than one type? A. Yes.

Q. And what portion or what parts of this operative procedure required the use of a hook type surgical needle such as may have been indicated in the X-ray that we examined earlier in the morning?

A. That is a curving needle. All of the operation, in all the operation a curved needle is employed, the only place a straight needle is used is in closure of the skin. [38]

(Deposition of Hubert E. Bonebrake, M.D.)

Q. That is outside? A. Yes.

Q. And did you, in connection with the plaintiff, Elsie Summers, employ curved needles in the course of this operation? A. I did.

Q. In the, we will say, careful practice of operations, who do you have in charge of the needles so you know how many needles are being used in an operation? A. Our surgical nurse.

Q. And in this particular case were those needles counted at the start of the operation?

A. They are counted at the start of the operation.

Q. Were they in this particular case?

A. I am sure they were.

Q. And, of course, your attention was directed to the physician's or surgeon's part of the job, is that right? A. Yes.

Q. When the operation is completed, in this case was the number of needles that had been used checked?

A. When the peritoneum was closed the needles were checked.

Q. The peritoneum? A. The Peritoneum.

Q. Peritoneum, is that the second layer or first layer? A. First layer.

Q. The inside of the pubic area out, is that correct? [39] A. Correct.

Q. And after that work is done then, are you through with the curving needle or do you still have further use of a curved needle?

(Deposition of Hubert E. Bonebrake, M.D.)

A. There is one more layer to sew with curved needles.

Q. And that is the layer you have described previously as the ones that were being sutured and closed up, is that correct? A. Yes.

Q. Is that particular layer, that particular part of the abdominal wall, was that inside of the abdominal cavity or is it laid in the layer of the abdomen itself, the closure of the entire wall of the abdomen?

A. In the wall of the abdomen, not on the inside of the abdomen.

Q. Not on the inside. A. No.

Q. Whatever surgical procedure you had followed came from the inside of the abdomen or inside of the area where the vagina and fallopian tubes lay out to the outside?

A. I don't understand your question.

Q. I don't know whether I asked you that right or not but what I had in mind was the only part of this surgery performed on plaintiff consisted of going on inside of the abdominal wall to the area where the uterus and fallopian tubes were and suturing the inside of the abdomen first and then peritoneum [40] and the middle wall and the outer skin, is that correct? A. Correct.

Q. Those needles that were being employed, of course you, as a surgeon, knew it was important, did you not, to know they were all, each had been removed after having been used or accounted for on the operating table? A. Yes.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. Was that done in this case?

A. That was done after the peritoneum was closed.

Q. You didn't make separate counts of needles, that is, count when you went into the inside of the abdomen, count needles, and again when the peritoneum layer was closed count them again?

A. They were counted when the peritoneum was closed.

Q. And they were counted before the operation was started, were they not?

A. I am sure they were.

Q. So in careful checkup on the number of needles that were used to start with and the number of needles that were there at the finish, they should all be accounted for, all the needles be accounted for?

A. Yes.

Q. And at a subsequent time you did, however, discover there was one needle that had not been accounted for, did you not? One surgical needle that had not been accounted for that [41] had been left in the body of the plaintiff here?

A. Not at the time of the surgery.

Mr. Miller: I will object to the form of the question as being a double question, you asked two questions. I think he should have the opportunity to answer whether there was or was not a lost needle and then when he discovered there was a lost needle.

Q. Asking one question at a time, you assumed, during the course of this operative procedure that all needles had been accounted for that had been

(Deposition of Hubert E. Bonebrake, M.D.)

used by you or by your assistant in this operation?

A. After the peritoneum was closed?

Q. Yes.

A. Up to the time the peritoneum was closed they are accounted for, between the time that is closed and the skin is closed, yes, we assume they are accounted for.

Q. It isn't common practice, is it, to leave to chance the presence of an operative needle or surgical needle before the peritoneum wall is closed? It isn't common practice just to take a chance and not know all needles have been accounted for?

A. No, it is not common practice.

Q. After the peritoneum is closed, as far as you were concerned, wouldn't you say it was just as important to see the needle that had been used in the operation had been accounted [42] for throughout?

A. We will say from the primary area of the operation, closing the abdominal wall, accounting for needles after that, yes, is important. However, we are outside of the abdomen at that time, that is when the sponge count is made, when the peritoneum is closed.

Q. And in regular, proper or approved methods of procedure the count of the needles is made and you know in no portion of the abdomen there isn't a surgical needle left, there should'nt be one left in proper procedure? A. No.

Q. You say no or do you agree?

A. I agree a needle should not be left.

Q. Then coming along during this period of

(Deposition of Hubert E. Bonebrake, M.D.)

time subsequent to March of 1951, did you have occasion to perform any other operative procedure in the area of the uterus or fallopian tubes or abdominal wall of the plaintiff subsequent to '51?

A. Yes.

Q. When was that? A. 1956.

Q. I mean between 1951 and 1956?

A. No.

Q. There wasn't any other surgical procedure performed, at least by you, was there?

A. No. [43]

Q. And in 1956 you didn't find any evidences of any other surgery except the one from 1951, is that correct? A. That's right.

(Recessed 12:08, reconvened 1:30.)

Q. Resuming after a noon recess, Doctor, we were discussing, I believe, the method of sealing up the wounds there at the time of the original operation and I would like to inquire further about, at the time, Doctor, the close of the operation, what assistance, if any, you had in the way of medical, professional men in the operation itself?

A. Dr. Paul M. Ellis.

Q. Dr. Ellis was assisting you, was he, with the operation? A. Yes.

Q. In what specific particular?

A. He was my first assistant for that operation; two of us always operate on major surgery.

Q. And whenever it would be the course of practice of the first assistant was being taken care of by Dr. Ellis at that time? A. Yes.

(Deposition of Hubert E. Bonebrake, M.D.)

Q. And you also had the surgical nurse?

A. Yes.

Q. Who had charge of the sponges and surgical needles, among other things? A. Yes. [44]

Q. What was the approximate period of time this operation took from start to finish, if you recall?

A. It would be on the record, two hours.

Q. During which time Elsie Summers was, of course, under anesthetic? A. Yes.

Q. Do you know what type?

A. There again that would be on the record.

Q. Whatever the record shows would be what was used. Now then later, after the operation was completed, she remained in the hospital for a period of time and then was discharged, is that right?

A. Yes.

Q. Later and following this operation, I presume Mrs. Summers was in contact with you professionally, was she, in connection with the progress of the case after the operation?

A. She was in the office two or three times after the operation.

Q. She made calls to the office at the hospital, is that correct? A. Yes.

Q. Naturally, I presume, you were interested in the development of the case and as to whether or not she was recovering? A. Yes.

Q. Isn't it your recollection, Doctor, that she, however, [45] was doing a considerable amount of

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complaining about pain in the abdomen and back following this operation?

A. She complained of back pain.

Q. Back pain primarily? A. Yes.

Q. Did you relate that to the operation itself or to any other possibility?

A. I didn't relate it to the operation. In fact, she had back pain before the operation.

Q. It was just one of the circumstances that were present in the case, is that right? That back pain was one of the circumstances that was present in the case?

A. It was something she had complained of.

Q. Yes. However, Doctor, the following summer you did conduct further examination of her, didn't you, Doctor, the next year, in '52?

A. In 1952 she was hospitalized for two to three days, according to the records here, for an abdominal pain.

Q. I was noticing a portion of the hospital records, that is the bedside notes particularly, I think it is maybe sheet No. 1 of bedside notes, at least the record says that she was admitted ambulatory through the emergency room and there was severe abdominal pain that relates to the lower back?

Mr. Miller: Just a second. I am going to object to the question unless the witness is handed records to which counsel [46] refers, which, I presume, is the record here?

A. Yes. I think the Doctor may have reviewed them recently, I can get them if necessary. We

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will notice from the original record, apparently taken from the personal history, and I was inquiring about this first complaint that was made and also these matters that are listed here in the course of these records which are somewhat confusing because of not having the same heading, but at least you can refer to the chief complaints that are mentioned there. I am going to use this, use the copy that was furnished us because that is what we have to go by and the reference here, you will notice it is referred to as bedside notes on their copy. At any rate, that is not too material. The thing is which is related here, "admitted ambulatory through emergency room" and also mentioned a specimen of urine obtained and severe abdominal pain that radiates to the lower back and then it refers to what was given her, demeral and so on. There is another there that we are not familiar with the name of, streptomagna, is that true?

A. That is a medication.

Q. And at this time in the following year she was admitted to the hospital concerning this back pain, wasn't she, and abdominal pain?

A. Mostly abdominal pain as I recall at that time.

Q. OK. The only thing I was trying to do was to question you concerning the records which admittedly, of course, are here. [47] And again the following year in 1953 we have, we don't have a hospital record but we do have a series of X-rays that were taken of the plaintiff, Elsie Summers,

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in which a gall bladder examination was made, isn't that right? A. Yes.

Q. And gall bladder pain is reflected normally where? Where would it say "hello" to the person that had it, on the body?

A. Pain in the upper abdomen and pain through to the upper back.

Q. And in 1953 there was a number of X-rays taken with relation to attempting to diagnose a gall bladder situation? A. That's right.

Q. It is also true you had connection with her complaining of pain in the abdomen and back at that time, didn't you? A. Yes.

Q. And then going on to the time when the X-rays were taken in 1956, at that time you took a number of X-rays in connection with this foreign body that appeared in the X-rays and you took X-rays from various positions, did you not?

A. Yes.

Q. And also with relation to the body itself, lower down in the pubic region than you had taken them previously, is that correct?

A. Yes, that's correct. [48]

Q. Now, after having taken and having these X-rays to aid you in locating this foreign substance, did you then proceed to remove the foreign object?

A. Yes, and after consultation with the patient I removed it, yes.

Q. Then I wonder if you will please relate what procedure you took to do that? What was done and how did you go about it?

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A. She came to me in 1956, with this story that she had a needle and I took a series of X-rays at various angles, anterior - posterior, lateral views, X-rays taken with her standing and with her lying down to help me locate this needle. On reviewing the X-rays it was our opinion this needle was not in her abdomen, it was in the abdominal wall. She was advised in our opinion this needle had absolutely nothing to do with the pain she was complaining of but if she wanted this needle removed, we would take it out. She wanted it removed so we did take it out. She was taken to the X-ray room and under local anesthesia, to aid us in actually pin-pointing this foreign body, straight needles were placed through the skin in this area, and with the aid of the fluoroscope and X-ray pictures, these needles were inserted until the points of them were directly over the foreign body. We knew then exactly where to make our incision to most easily remove this foreign body. She was then taken to surgery with the needles still in place, anesthetized and an incision was made lateral to the original incision. We felt the easiest approach was to make another incision rather than to try to go through the old scar. [49] The object which was a steel needle was found readily and removed. It was a broken needle, not a full needle. The eye was broken off. The other part of the needle was not in the wound, only one piece.

Q. Then the other part of the needle wasn't discovered? A. Was not in the wound.

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Q. Was it located at all in the course of the examination, the eye part of it? A. No.

Q. Never had been as far as you know until now, never had been located as far as you know up until now? A. No, it has not.

Q. After you removed the surgical needle, Doctor, you gave it to her, didn't you?

A. Yes, a couple of days later she said "Where is the needle?", I said "I have it, do you want it?" and she said "yes" so I gave it to her.

Q. And at that time you delivered this needle you found, delivered it to her? A. Yes.

Q. May I inquire specifically where did you find the needle at the time you removed it, where was it with respect to the body?

A. It was lying in the extra peritoneal space, which is outside [50] the peritoneum, between that layer and the layer of muscles in the abdominal wall.

Q. And in this particular case, referring to this particular case, as you remember, how thick is that peritoneal substance?

A. The peritoneum itself?

Q. Yes. A. 1/32" to 1/16".

Q. It is comparatively thin layer of membrane, is it not? A. Yes.

Q. In your removal and searching and finding this surgical needle, did you find any evidence of scar tissue adjacent to it? I mean by that did it appear to have moved from one place to another?

A. No.

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Q. What was the situation with respect to the surrounding flesh of the needle itself?

A. It was perfectly normal. There was no scar tissue about the needle, no septic flesh. It was lying there in a pad of fat.

Q. What I was inquiring about, is there a possibility this needle could be moving during this period of time between '51 and '56 in the patient's body? Could it be moved from the inside out, along or lateral, or in the position it was found, could it previously have been somewhere else? [51]

A. In my opinion, absolutely no.

Q. Is is your opinion it was in the same place during this period of time from the plaintiff's operation, is that true? A. That's true.

Q. With respect to the outside layers now, coming from the needle outside in the abdominal wall, what would be the thickness there approximately of the outside layers? That heavy muscular tissue and fatty substance, if any, and the skin itself?

A. In this individual I would judge the distance from the skin to where the needle lay was 2 inches to 2 and a half inches.

Q. That would be the thickness of the abdominal wall outside the peritoneal wall, is that true?

A. That's right.

Q. Then after this procedure was had and the needle turned over to the plaintiff, she was discharged in a period of three or four days, was she?

A. I think it was four to five days, it is on the record there.

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Q. At any rate, after a local anesthetic was employed to locate the foreign body, you did perform surgical operation with general anesthetic, did you not? A. I did.

Q. In connection with the needle, having, being a broken needle, in the course of the operation do you recall having a [52] needle broken while you were using it?

A. I don't recall specifically. However, we know practically every time we operate a needle is broken sometime during the procedure, a very common thing to happen.

Q. There is nothing particularly unusual, there is nothing particularly unusual about having the head of a needle break out while you are suturing, is that right? A. That's right.

Q. There was another matter we wanted to relate to and that is the fact that we had named as defendant here Lewis B. Hunter and one of my original inquiries was his connection with the Wallace Hospital, you having explained that at the time this original operation took place he was a member of the partnership arrangement and then later left. Do you know when it was, approximately, that he left?

A. I think it was July, 1954.

Q. July '54, so that at the time this original complaint was served or filed, at least, and served upon you, Lewis B. Hunter no longer was a member of that partnership, is that right? This would

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be in '57 I imagine sometime, and he, at that time, was not a member of the partnership?

A. That is correct.

Q. We are trying to fix the time that he ceased to be for the record. I think that's all.

(Witness excused.)

/s/ HUBERT E. BONEBRAKE,
Deponent. [53]

[Endorsed]: Filed September 18, 1958.

[Title of District Court and Cause.]

DEPOSITION OF DR. R. W. CORDWELL

Be It Remembered, pursuant to stipulation of counsel, the deposition of Dr. R. W. Cordwell was taken in the District Courtroom of the Shoshone County Courthouse, Wallace, Idaho on the 26th day of August, 1958 at the hour of 2:54 P.M., M.S.T. Present at the taking of said deposition were the following: Elsie Summers, plaintiff, with her attorneys of record, Mr. James W. Ingalls and Mr. M. J. Doepker; Dr. R. W. Cordwell, deponent; Mr. E. L. Miller, attorney of record for the above named defendants; Merle Myers, Deputy Clerk of the First Judicial District of the State of Idaho, before whom said deposition was taken, and Irene Vermillion, Court Reporter, who took said deposition down in shorthand and later transcribed the same into typewriting.

Whereupon the following proceedings were had and done, to-wit: [1]*

DR. R. W. CORDWELL

called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Doepker): Will you kindly state your name, please?

A. Robert William Cordwell.

Q. What, if any, profession are you engaged in?

A. Practice of medicine and surgery.

Q. And have been engaged in that profession in the Coeur d'Alene District, have you?

A. Yes.

Q. For how long a time?

A. Ten years and ten months.

Q. You have been duly licensed in the State of Idaho to practice your profession as surgeon and physician? A. Yes.

Q. In the course of such practice, Doctor, did you ever have occasion to have as your patient one Elsie Summers, the lady sitting here in the courtroom? A. Yes.

Q. You recognize her as the lady in question, do you? A. Yes.

Q. Where was that, Doctor, in what part of the Coeur d'Alene District? [2]

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* Page numbers appearing at bottom of page of Original Deposition.

(Deposition of Dr. R. W. Cordwell.)

A. This was in Kellogg, Idaho at the Wardner Hospital.

Q. Are you connected with the Wardner Hospital or were you at that time?

A. Yes, and I still am.

Q. In connection with this patient-physician-surgeon relationship were there some hospital records kept of this episode? A. Yes.

Q. Did you bring those records with you into court today? A. Yes.

Q. Do you have them with you? A. Yes.

Q. Are you in a position to detail the details of all the examinations that were made at that time from memory without the aid of these records of the hospital? A. No.

Q. The hospital records would give you an exact record and the exact picture of the situation, isn't that correct?

A. Yes, particularly the dates.

Q. All right. Then may we examine them, Doctor? You have delivered to counsel a series of pages of records including some card records and the card records bear the name of Mrs. Arthur (Elsie) Summers and also the page records bear the name or patient's name, Mrs. Elsie Summers. In each of those cases do they relate to the lady in the courtroom at the present time? [3]

A. Yes.

Q. I observe that there appear to be two different records here, is that correct?

A. That is correct, in fact, there are three dif-

(Deposition of Dr. R. W. Cordwell.)

ferent records. One is for our clinic, that is our office record, the other two are hospital records.

Q. Then we would like to number these in some sort of sequence, that is as to time and which would be the first of the two sets of records, Doctor?

A. This one.

Q. You have indicated a series of records bearing date August 5, 1955, is that right?

A. That is the first hospital record. The clinic record probably should be first because we usually make notes on that, when a person is admitted.

Q. Let's go back for the time being and mark this in sequence as an exhibit please?

(Plaintiff's Exhibit D-25, Clinic Card, marked for identification by reporter.)

Q. Calling your attention to a mark having been made by the reporter, Plaintiff's Exhibit D-25, that is for the purpose of identification, will you please state, Doctor, what that is?

A. That is my clinic record of Mrs. Elsie Summers.

Q. And is that a record that was kept in the usual course of business of the Wardner Hospital at Kellogg at that time? [4]

A. Wardner Hospital and Clinic.

Q. I see, Wardner Hospital and Clinic and this is the clinic?

A. Yes, this would be the record which a doctor would keep in his office.

Q. All right. At any rate the clinic record which is represented by Plaintiff's Exhibit D-25 contains

(Deposition of Dr. R. W. Cordwell.)

what? I mean, is it notations that you made or that were made under your supervision at the time?

A. Notations that I made and also that Dr. Scott made.

Q. Was Dr. Scott associated with you in the Wardner Clinic at the time?

A. Yes, he was my partner.

Q. As I understand it, this is the original record that was made in connection with Mrs. Elsie Summers? A. Yes.

Q. We want to offer this in evidence.

Mr. Miller: I would like to ask the witness one question.

Mr. Doepker: OK.

Mr. Miller: Over what period of time, the beginning date and ending date, does that record cover?

A. This starts 8/5/55, August 5, 1955 and ends on 8/30/55.

Mr. Miller: On 8/30/1955?

A. Yes.

Mr. Miller: Is that all the records you have which concern [5] patient, you haven't seen her at any time since that date?

A. That's correct, nor before.

Mr. Miller: Thank you.

Q. Then directing your attention to another series of documents, will you please generally state what those documents are?

A. This is a hospital record of Mrs. Elsie Sum-

(Deposition of Dr. R. W. Cordwell.)

mers during her admission to the Wardner Hospital, Kellogg, Idaho, starting 8/5/55.

Q. Going through to what date does it show on the record? A. 8/12/55.

(Plaintiff's Exhibit D-26, hospital records, marked for identification by reporter.) (D-26A thru D-26G.)

Q. And for the purposes of identifying individual items, Doctor, will you please go through there and state what they represent?

A. The first sheet is an Admission Blank which usually states a person's name, age, sex, date of birth, nearest relatives and so forth; second sheet is a charge sheet, record of hospital charges; third and fourth sheets are called clinical sheets, we keep a record of respiration, pulse, temperature, medications and sometimes nurses' notes; fifth sheet, this should be sheet D, Doctor's Orders sheet; Sheet E is Laboratory Record; F is the history and physical; and G is roentgen examination report, commonly known as X-rays but erroneously so. [6]

Q. Further identifying, Doctor, you have brought with you a series of reports which appear to bear the date of August 24, 1955?

A. Yes, sir.

(Plaintiff's Exhibit D-27, D-27A, D-27B, D-27C, D-27D, D-27E, D-27G, hospital records, marked for identification by reporter.)

Q. May I please inquire now, Doctor, whether each and all of these proposed Exhibits D-25, D-26

(Deposition of Dr. R. W. Cordwell.)

and D-27 were kept in the usual course of business of the Wardner Hospital and Clinic at Kellogg?

A. Yes.

Q. Bearing the dates that they purport to bear?

A. Yes.

Q. And kept correctly to the best of your knowledge in all detail? A. That is correct.

Q. Then subsequently or during the time that these episodes in the clinic and hospital, did you have occasion to take some X-rays, the term is X-ray negatives, of the plaintiff?

A. Yes, sir.

Q. May we see them please? You have presented to counsel two X-ray films and are these identifications upon them to connect them with the plaintiff, Elsie Summers?

A. Yes, sir, her name is on them, Mrs. Arthur Summers is [7] the name on there. I understand it is one and the same person.

Q. Should one of these be ahead of the other?

A. No, they were both taken the same day, I think they are different views.

(Plaintiff's Exhibits D-28 and D-29, X-rays, marked for identification by reporter.)

Q. Now, Doctor, please, as to Plaintiff's proposed exhibits D-28 and D-29, are these exhibits taken of the patient, Elsie Summers, the plaintiff in this case, on or about August 6, 1955?

A. Yes.

Q. And have been in your possession and are records of the clinic and hospital since that time?

(Deposition of Dr. R. W. Cordwell.)

A. Yes, sir.

Q. Do the negatives indicate which side is the right and left by some identification?

A. Yes, sir, there is an "R" on the right side.

Q. These were taken of the patient by what type of X-ray apparatus do you employ at the hospital?

A. We have two different ones, one is an old G.E. and one is a newer Westinghouse. I think these were taken by the Westinghouse. I did not take them.

Q. They were taken by some technician at the hospital?

A. Yes, registered technician.

Q. Under your direction as physician and surgeon? A. Yes. [8]

Q. And do they, to your knowledge, correctly depict the portion of the anatomy to which they were directed? A. Yes, sir.

Q. Now, Doctor, with whatever assistance you need of the records which we have presented, may we please inquire whether the plaintiff, Elsie Summers, upon the occasion of the original clinic record, came to you for the purpose of treatment?

A. Yes, sir.

Q. And did you then proceed to take a history from her? A. Yes, sir.

Q. And do you remember or do the records there indicate what the history was that she gave you at the time?

A. My memory is much better if I have the records.

(Deposition of Dr. R. W. Cordwell.)

Q. You may use them.

Mr. Miller: Will you please tell me to which you are referring?

A. The one I have now is D-26 on 8/5/55, hospital record.

Q. We were asking you to relate what the history was given you by the prospective patient at the time?

A. All right. Her chief complaint was pain in the vagina, present illness, patient is a 41 year old married white woman, this is slightly paraphrased, who has had increasing pain in the vaginal region and lower abdomen for the past week. Now extremely painful to motion. In March, 1951 patient had hysterectomy, tubes and uterus removed, and appendectomy and perineorrhaphy by Dr. Bonebrake of Wallace, Idaho. [9] She has five living children, two miscarriages; patient states that in 1949 she had an attack similar to that at present. Examination, patient is a 41 year old moderately obese white woman with positive findings limited to abdomen and pelvis. There is generalized abdominal tenderness, most marked across lower abdomen with no rebound. Pelvic exam: outlet parous; patient complains of extreme tenderness of vagina, even at the outlet. No masses felt or seen; X-ray abdomen shows curved round surgical needle in pelvis to right side. Diagnosis, pelvic cellulitis, acute. Foreign body in pelvis.

Q. Is that the——

(Deposition of Dr. R. W. Cordwell.)

A. That is what I have done, I may have paraphrased a couple of things to make it more legible.

Q. At any rate, does that represent your history and also your findings that were made at the time?

A. That is correct. The X-ray was made the following day.

Q. But with reference to this particular exhibit, which I believe you stated is D-26, the rest of the exhibit consists of things you have mentioned, that is nurse's records and so on?

A. That's right, laboratory——

Q. Laboratory exam and so on. Now, referring to the film D-28 and D-29, are you able at this time to point out the foreign body that you referred to in your report?

A. Yes, sir, it is right here. [10]

Q. You are indicating with a pencil a curved object that in the film lies, what do we call this bone? I mean in the film?

A. It would be above the pelvic brim. You could see by this it probably would be anterior from the pelvis or toward the front, because this is the back part, this is the hole through which babies come.

Q. All right. And naturally you did see that object laid in anterior in the pelvis?

A. I think so, you can't tell for sure on flat film. This is the right side, you reversed this.

Q. It appears in both films is that right?

A. I took the second film to be sure it wasn't

(Deposition of Dr. R. W. Cordwell.)

artifact, something that looks like it was there only isn't.

Q. At any rate your examination was made on the date of her admission?

A. That was made the day after.

Q. And the next day after the X-ray films were obtained, you found you had evidence of a foreign body or surgical needle in the plaintiff's abdomen?

A. I found it within fifteen minutes after they were made. I looked at them wet. She came in at 9:00 p.m. and we got films the next morning.

Q. Did you also have a diagnosis of another condition besides the surgical needle?

A. Oh, yes, sir. [11]

Q. What did you call it?

A. I called it pelvic cellulitis.

Q. How do you spell cellulitis? C-e-l-l-u-l-i-t-i-s?

A. Exactly the way it is.

Q. Which means what?

A. To me it means generalized infection, inflamation.

Q. Then subsequently, I think we had one other, D-27, what was the occasion for this episode of the 24th of August?

A. Could I see the clinic record, please?

Q. You bet.

A. Dr. Scott admitted her for me at that time. According to his notation—is it all right to read his notation?

Q. That will be offered in evidence. I presume you and he were associated in the matter?

(Deposition of Dr. R. W. Cordwell.)

A. Yes, sir. He has "Pain in pelvis since release from hospital. Has had chills, much more severe past one to two days, admit for R.C." That means he admitted her for me.

Q. At that time did you make any further physical examination or what was the course of treatment?

A. History and physical were as before, very similar. I did, however, examine her under sodium pentothal, as I recall she was quite tender and it was quite difficult to get a good examination. And I made wet and dry smears of her vaginal secretions but I found nothing different.

Q. Were there any recommendations made by you at that [12] time concerning anything in the nature of removal of this foreign object or does your record show?

A. My record doesn't show that and I don't remember exactly.

Q. All right, Doctor. Doctor, from your examination of the patient and these X-rays and the finding of a foreign object in the pelvic region, would it be your recommendation to have this foreign object removed?

A. That would depend on whether I thought it was causing her difficulty or not.

Q. And from that would be based your recommendations, is that it, from that situation?

A. Yes, sir.

Q. But you do not have in the record any rec-

(Deposition of Dr. R. W. Cordwell.)

ord of a recommendation at all or any memory about it?

A. I can't remember whether I told her it should be removed or not but I don't have it in the record.

Mr. Doepker: You may inquire.

Cross Examination

Q. (By Mr. Miller): Referring to Exhibit 26 and 27, Doctor, for the purposes of this deposition, the records of the hospitalization of the plaintiff in this action, were there also nurse's notes taken?

A. Only what is in here. [13]

Q. No other nurse's notes?

A. No other nurse's notes.

Q. Fine. Now, Doctor, referring to Exhibits 28 and 29 for the deposition, what type of X-ray is this, what type view is it?

A. A-P, anterior, posterior. It was taken with her lying on her back on the table, shooting through with the film underneath.

Q. In other words, you have heretofore testified it is difficult to determine on flat film whether or not the needle would be located in the cavity or exterior of the cavity? A. That's correct.

Q. And at no time during your examination did you make a diagnosis that this needle was within the cavity itself?

A. Excuse me, what do you mean?

Q. Well, inside? A. Abdominal cavity?

Q. Yes.

(Deposition of Dr. R. W. Cordwell.)

A. No, I did not make that diagnosis.

Q. In other words, your diagnosis was there was a foreign body and its location was in the pelvic area and that was as far as the diagnosis could go with the X-rays taken?

A. That's right.

Q. Doctor, I am handing you what has been marked for identification as Exhibits D-12, D-14 and D-15 for the plaintiff in [14] this action and ask you to examine those X-rays and tell me what type view that these X-rays show?

Mr. Doepker: Just a moment, let the record show that plaintiff objects to the question on the ground and for the reason that it is improper cross examination because the matter was not gone into on direct examination of Dr. Cordwell.

A. You understand they are not on a view box and I usually look at X-rays on a view box. You mean these are all the same view?

Q. No. I asked you what type X-ray would they be, anterior-posterior or lateral view, sir?

A. None of these are anterior-posterior. This is a lateral, this is D-12, this is a lateral of the pelvis.

Q. Pelvic area?

A. Pelvic area and shows part of the lumbar spine.

Q. And the other two, Doctor?

A. This is D-15, this is also a lateral view, shows very slightly oblique and that would be lower down, shows the hip, shows left of the hip

(Deposition of Dr. R. W. Cordwell.)

joint, shows sacrum, coccix, upper part of the sacrum and pelvis.

Q. And the other one?

A. This is D-14, this is another lateral view but it definitely a little bit poor, I don't think it is very much oblique, it is pretty much a lateral view of the pelvic area.

Q. Then all three X-rays you have testified to, being [15] X-rays marked D-12, D-14 and D-15, represent lateral X-rays of the pelvic area?

A. I don't quite—the answer is yes and no. You might not seek for it, you might seek for a specific area, but in general.

Q. General, fine. In addition to bone and the foreign object, do X-rays generally show soft tissue?

A. Not very well. They do to a limited extent to a qualified radiologist, which I am not.

Q. In other words, I take it from your answer, you cannot examine any of these X-rays and determine the existence or non-existence of soft tissue?

A. I think you could. Perhaps I misunderstood your question.

Q. I say do X-rays show soft tissue?

A. I said yes, to a limited extent.

Q. Examining X-ray D-12, do you see any soft tissue?

A. May I see it, sir? Well I can see shadows representing part of the soft tissue.

(Deposition of Dr. R. W. Cordwell.)

Q. Where do you see those in that X-ray, Doctor?

A. Every place there isn't bone, here is the back of the body here, probably this is the front, I couldn't be too sure.

Q. You are pointing to the low left corner of the X-ray? A. The way I am holding it.

Q. And there appears to be a foreign object in that lower [16] left corner, curved in nature?

A. That's right.

Q. And below that and to the edge of the film you traced out soft tissue?

A. I think it is soft tissue.

Q. That would be your opinion?

A. As far as I can tell on this film.

Q. Having examined these films, being D-12, D-14 and D-15, and assuming they were X-rays taken of plaintiff, would you have an opinion at this time as to the location of the foreign object, the surgical needle? A. Yes, I would.

Q. What would your opinion be, Doctor?

A. I would say it is outside the pelvis proper, outside of the abdomen.

Q. Cavity?

A. Here in front, outside the abdominal cavity. I want to make myself as accurate as possible.

Q. You first saw Mrs. Summers on the 5th of August of 1955, is that true, sir?

A. That's correct.

Q. At that time she complained, as you testified, to having had pain for the past week?

(Deposition of Dr. R. W. Cordwell.)

A. That's right.

Q. She gave you no history of having had pain prior to [17] the week before she came to you?

A. I have no history marked down that way, I don't recall.

Q. Had she told you "I have had pain four years, five years"?

A. I would have written it down.

Q. It would have been reflected by your records?

A. That's right.

Q. She further—you further testified, Doctor, she told you in 1949 she had a similar attack?

A. That is correct.

Q. What do you mean, Doctor, when you testified there was no rebound to pressure upon the stomach?

A. Rebound tenderness is considered a diagnostic sign of peritonitis. You push on the abdomen. It may or may not hurt. Usually hurts when you release it, if you have rebound tenderness, it hurts as the peritoneum slips upwards.

Q. What is peritonitis?

A. It is infection or inflamation of the peritoneum.

Q. When you apply this pressure you put good pressure on the patient?

A. As much as the patient can stand at the time.

Q. While you were doing this was there any particular complaint from the plaintiff as to localized pain?

(Deposition of Dr. R. W. Cordwell.)

A. May I see my records? [18]

Q. Yes, sir.

A. I have in the record that the pain was most marked across the lower abdomen.

Q. What area would that entail?

A. The lower abdomen would mean to me from the umbilicus on down.

Q. Would that be a large area or small area?

A. That would cover a reasonably large area.

Q. Would that cover the entire area from the navel on down?

A. Might be part of it.

Q. But there was general soreness?

A. That's right, and I have it marked.

Q. In other words, there was no particular localization of any complaint of pain?

A. You mean while I was examining her?

Q. During that examination.

A. It was just localized pain. There was more marked pain in the lower abdomen than there was in the upper, there was more marked tenderness, but there was some tenderness in the upper abdomen also.

Q. But it wasn't localized at one particular point on her body, it was general? A. Yes.

Q. If this surgical needle were to be such as to cause her pain and you were to put pressure on it, wouldn't that pain be localized? [19]

A. Would you re-state that question, please?

Q. If this needle were to cause her pain?

(Deposition of Dr. R. W. Cordwell.)

A. If the needle were the thing that was causing pain?

Q. That's right, and you were to apply pressure on that, wouldn't there be local pain by virtue of that pressure rather than general pain over the entire area?

A. That depends on many things. If there were quite an infection all around it might not make so much difference. If the needle itself were causing the pain you would expect it, in my opinion, to hurt more as I pressed over the area of the needle.

Q. Your entire diagnosis of her was infection, as I understand it, in the vagina? A. No.

Q. That is what you treated her for?

A. No, the infection was in the pelvic region. That includes the vagina, those soft tissues in the lower part.

Q. What treatment did you prescribe for her?

A. I prescribed several things. Demerol for pain, I gave penicillin, streptomycin, hot douches, and later I gave her achromycin, which is a trade name for tetracycline, and then later I painted her vagina with gentian violet. That was the first time she was in the hospital.

Q. And the second time she was in the hospital, did you [20] give her substantially the same treatment, Doctor?

A. We changed the antibiotics somewhat. Gave her one which we call mycostatin, used for treatment of monilia, gave her erythromycin; substan-

(Deposition of Dr. R. W. Cordwell.)

tially the same treatment. Dr. Scott ordered hot Sitz baths also.

Q. Now, Doctor, assuming that this curved needle, surgical needle, was on the anterior of the peritoneum——

A. You mean in the anterior abdominal wall or outside of it?

Q. Outside of it. A. Yes.

Q. Could that have been the basis of the difficulty of which she complained and you treated her for, this infection in the pelvic area?

A. I don't think it was the cause and I told her that at the time.

Q. In other words, you told her this needle was there? A. Yes.

Q. What did she say?

A. I don't remember exactly.

Q. She made no complaint of having any particular complaint? A. I don't recall.

Q. Doctor, did she ever complain to you, I am referring to her complaint, that by virtue of this needle she had pain from intercourse?

A. I don't know, I don't have it marked down.

Q. Had she told you that wouldn't you [21] have marked it down? A. Probably.

Q. And you didn't? A. I didn't.

Q. Referring again to the complaint of the plaintiff, Doctor, are there any female organs located in the area of the needle as shown by Exhibit number, in the area, referring to Exhibit D-12,

(Deposition of Dr. R. W. Cordwell.)

where the needle is located in the lower left-hand corner?

A. The question was are there any female organs located in that area?

Q. Assuming the needle is located on the outside of the pelvic cavity, would there be any female organs in close proximity to the surgical needle?

A. The thing that makes me pause is when you say "close proximity", what do you mean?

Q. I mean so the needle could touch them?

A. No.

Q. Now, Doctor, it's a fact, isn't it, that you use different needles in closing the cavity after performing a hysterectomy for the different layers of tissue you go to close? A. Yes.

Q. What type needle do you use to close the peritoneum?

A. Round needle, I am talking about what I use, you understand that. [22]

Q. Is it common practice to sew that peritoneum? A. Yes.

Q. Now what is the next level you are going to close on the cavity as you come towards the surface?

A. This is on abdominal surgery with low mid line incision?

Q. Yes. A. Next would be the fascia.

Q. What type tissue is that, tough?

A. Yes, tough connective tissue.

Q. What are the accepted procedures of closing that, Doctor, as employed in this area?

(Deposition of Dr. R. W. Cordwell.)

A. I can speak only for myself and associates because I have never seen anyone else in this area operate. We close it usually with interrupted sutures on a round needle. Occasionally we would use continuous suture but I would also employ a round needle.

Q. Have you ever used surgical clamps to close that? A. No, sir.

Q. Do you know, sir, is that done in this area?

A. Not that I know.

Q. It is accepted practice, surgical clamps, metal sutures?

A. Wire sutures, sure, we use those. More often in the upper abdomen. [23]

Q. Would you describe a wire suture?

A. Just a long piece of steel wire.

Q. How is it applied in closing the fascia?

A. It can be employed several ways. The way we use it is a figure eight, come over and back and tie a square knot.

Q. Is that left in the patient? A. Yes.

Q. How long does it stay? A. Forever.

Q. Would that be a foreign body?

A. Yes, steel.

Q. Would that be steel similar to a steel needle?

A. I think so.

Q. Would there be any trouble from that, Doctor? A. No more than any other suture.

Q. How many figures eights or knots do you make?

(Deposition of Dr. R. W. Cordwell.)

A. You mean how many sutures you make? You put in one and then another one, they are interrupted and not continuous.

Q. How many would it take to close such a cavity, particularly on a person the size of the plaintiff?

A. Seven or eight, nine, around there.

Q. And they would remain with the patient until death unless you went in and took them out?

A. That's right, unless they caused trouble. [24]

Q. Have you ever experienced trouble in using that type suture? A. Yes.

Q. But you continue to do so?

A. Continue to use sutures?

Q. Yes. A. Yes.

Q. What other foreign body do you use or employ in the human body in the repair of it, particularly as far as limbs or joints are concerned?

A. You mean limbs or joints? What you call non-absorbable sutures, cotton, silk, sometimes nylon.

Q. They don't absorb?

A. They just stay there.

Q. In the repair of femur heads, sometimes they become necrotic or dead because of lack of blood supply, sometimes plastic heads are inserted, sometimes metal heads are inserted and they are held in place by an intramedullary nail?

A. They are not, that type of thing is usually screwed in, you use plates and intramedullary pins and screws, type of nails associated with plates in

(Deposition of Dr. R. W. Cordwell.)

fixation of different fractures. There must be others but I don't think of them offhand.

Q. Now, Doctor, you testified that in palpitating the stomach you felt no masses, do you recall that?

A. Could I correct that? I wasn't palpitating.

Q. What would you say would be the correct statement? [25]

A. I palpated her abdomen, I felt no masses.

Q. Assuming this surgical needle was infected, wouldn't you expect to find mass or hardness in that area?

A. Well, if it is in the abdominal wall, as it appears to be in these X-rays, then you would expect to find something, hardness.

Q. In other words, your answer is based upon the assumption the needle was located outside the cavity? A. That's correct.

Q. And had it been located outside the cavity there you would expect to find some hardness or mass?

A. Some hardness, I would say.

Q. You found none?

A. None to my recollection.

Q. And you have no recollection of advising or recommending that the needle be removed, as I recall your testimony?

A. No, I don't remember advising removal or non-removal. I don't remember saying either way, against it or for removal that I recall.

Q. As I recall your testimony, sir, on direct

(Deposition of Dr. R. W. Cordwell.)

examination, you stated if it were causing her difficulty you would have advised having it removed?

A. If I had thought it was causing difficulty, I would have advised removing it. [26]

Q. Did you advise her?

A. Not that I remember.

Q. Therefore could we form an opinion that you felt it was not causing the difficulty?

A. I remember my feeling about it at the time and I personally did not feel it was causing her difficulty.

Q. That would be your opinion as a doctor?

A. That is right.

Q. Did she recover from this condition you were treating her for, Doctor?

A. I don't know. You see I never saw her again after she left the hospital. She was recovered enough at the time to leave the hospital or I would never have let her go but I don't know what happened after that.

Q. She never returned for further treatment?

A. No.

Mr. Miller: I think that's all.

Redirect Examination

Q. (By Mr. Doepker): Would you, as a surgeon, recommend that a surgical needle be left in the wall of the abdomen of a patient?

A. No, I would not recommend it be left there.

Mr. Doepker: That is all. [27]

(Deposition of Dr. R. W. Cordwell.)

Recross Examination

Q. Doctor, there are different ways it might be left there, isn't that possible? A. Yes.

Q. In other words——

A. How do you mean, originally?

Q. Yes. A. Yes.

Q. And assuming it was left there without intent, without knowledge, couldn't that be, in your opinion, an accident?

Mr. Doepker: Just a moment, we object as improper redirect examination and also calling for an opinion of the witness upon a subject which is the province of the jury to decide under all the evidence of the case.

(Question read by reporter.)

A. Yes.

Q. Doctor, in the performing of an operation in this area and the suturing, as you have testified to, isn't it a common thing the needle will break, eyes will break out of them? A. Yes.

Q. What is the average, if there be an average, that you would expect to experience in doing this type of operation in having needles break?

A. I really don't know how to strike an average. I am sure you break at least one needle in operations of this sort.

Q. Assuming this needle is broken, assuming it is given [28] to the count nurse and assuming the count checks, has the physician done all he can do?

Mr. Doepker: We object to this as improper

(Deposition of Dr. R. W. Cordwell.)

recross examination and also that it is related to the ultimate question of the jury in the case to decide and not the subject of opinion evidence by any expert.

(Question read by reporter.)

A. Done all he can do?

Q. Insofar as that particular needle is concerned, Doctor? A. I expect so.

Q. What do you do if you happen to break a needle?

A. You always try to get it out, usually part of it breaks off and you have in clamps and I give it to the nurse, you fish it out and give it to the nurse and she is supposed to throw it away.

Q. You give it to the instrument nurse?

A. Yes.

Mr. Miller: That's all.

Re-Redirect Examination

Q. (By Mr. Doepker): With respect to all that a physician may do, he could make a recount if he thought there was a broken needle that hadn't shown up from the ones that had been used in the operation? A. He could, yes. [29]

Q. Wouldn't it be a very unusual circumstance to count the needles and have them count out correctly and then later discover that one had been left in some part of the body during the operation?

A. All I could say is that we usually don't count our needles. When one is broken it is thrown away

(Deposition of Dr. R. W. Cordwell.)

immediately off the table into a bucket and there are three or four people watching every needle.

Q. And then you do not count the needles before or after the operation?

A. No, sir, we count sponges and so forth.

Q. Then if a needle is broken you throw it away immediately after it is broken?

A. That's right.

Q. And that needle is not thrown away in the patient, it is thrown in some receptacle?

A. On the floor, the receptable is kept on the floor.

Q. The broken needle isn't thrown away in the patient you are operating on?

A. Not on purpose.

Q. That wouldn't be good practice?

A. No.

Q. How do you determine, Doctor, in your redirect upon your cross examination, how do you determine how all the needles used in the operation are taken out and are available after the operation [30] to be sure you haven't left a needle in the patient if you don't count them?

A. Well, as we use a needle, it is in a needle holder, we don't use it in our hand, a whole needle is turned back to the instrument nurse who keeps track of our instruments and after we are done with that particular needle she puts it on the instrument table beside her, we don't use the instruments on that, a small table, and if a needle is

(Deposition of Dr. R. W. Cordwell.)

broken we hand it to her, both parts, she picks it up and drops it into the bucket on the floor.

Q. I see, that is all.

Re-Recross Examination

Q. (By Mr. Miller): Isn't it possible a needle would get in a patient without someone throwing it in the patient?

A. I could see how that could be done.

Q. How many instruments do you have under your control while performing a hysterectomy, including needles?

A. You want me to enumerate them?

Q. What is a good estimate?

A. Probably at least 50 to 100.

Q. How many different needles would you have at your disposal or use? A. At least 20.

Q. You anticipate you are going to break [31] needles by having that many available?

A. Needles are fragile instruments.

Q. Now, Doctor, from your examination of the X-rays you have testified to, being D-28 and D-29, in your examination and careful study of those did you find the eye of a needle?

A. I don't recall it. No, I don't think there is an eye in that needle, not by those films.

Q. Doctor, recognizing that this is a surgical needle, curved in the middle, and having examined X-rays to determine its location, do you have an opinion as to whether or not that needle would move and travel through the body?

(Deposition of Dr. R. W. Cordwell.)

A. I have an opinion.

Q. What is your opinion? A. I doubt it.

Q. Your opinion would be that it would not, in your opinion?

A. That is probably true, that is an opinion.

Mr. Miller: That's all.

Mr. Doepker: That's all.

(Witness excused.)

/s/ ROBERT W. CORDWELL, M.D.,
Deponent. [32]

[Endorsed]: Filed September 18, 1958.

[Title of District Court and Cause.]

DEPOSITION OF DR. PAUL M. ELLIS

Be It Remembered, pursuant to stipulation of counsel, the deposition of Dr. Paul M. Ellis was taken in the District Courtroom of the Shoshone County Courthouse, Wallace, Idaho, on the 26th day of August, 1958, said deposition being taken immediately following the taking of the deposition of Dr. Hubert E. Bonebrake. Present at the taking of said deposition were the following: Elsie Summers, plaintiff, with her attorneys of record, Mr. James W. Ingalls and Mr. M. J. Doepker; Paul M. Ellis, deponent, with his attorney of record, Mr. E. L. Miller; Merle Myers, Deputy Clerk of the First Judicial District of the State of Idaho, before whom said deposition was taken, and Irene

Vermillion, Court Reporter, who took said deposition down in shorthand and later transcribed the same into typewriting.

Whereupon the following proceedings were had and done, to-wit:

DR. PAUL M. ELLIS

called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination

Q. (By Mr. Doepker): Will you please state your name? A. Paul M. Ellis.

Q. Is that Paul N.?

A. "M" as in May.

Q. Someway we got the letter "L." What is your profession? A. I am a surgeon.

Q. And have been practicing your profession in Wallace, Idaho for a period of years, have you?

A. Yes, 28 years.

Q. During that time have you been connected with the Wallace Hospital? A. Yes.

Q. And are you at the present still connected with the Wallace Hospital? A. I am.

Q. During the course of your practice as a surgeon, Dr. Ellis, have you had occasion to have as your patient Elsie Summers at any time?

A. She consulted me one afternoon for a small infection of her ear which had resulted from piercing for an earring. [2] I can't tell you the date, I think I have it in my notes.

(Deposition of Dr. Paul M. Ellis.)

Q. I was going to ask in connection with any treatment of her you had occasion to make notes?

A. The only time I did was October, 1952. This is on the office notes. This is a typewritten copy.

Mr. Miller: That's a recapitulation.

A. This is just some notes that were typed and photostated for my reference. The only other time I have had any connection with her in a medical way at all is assistance at surgical procedures.

Q. At the time of the original surgery in 1951 you were one of the surgeons in attendance?

A. I was in the operating room, yes, sir.

Q. Did you have any part of the operation which involved the suturing after the removal of the parts that had been removed yourself, were you doing any of this suturing or sewing?

A. The assistant usually takes hold of the suture, may tie knots, may cut it. I held sutures. Whether I did any actual suturing I would not be able to say.

Q. At any rate you are not making records?

A. No, I am acting as a surgical assistant in a routine manner.

Q. Then subsequent to March of 1951 did Mrs. Elsie Summers contact you at any time in the development of the case, report to you about it? [3]

A. As far as I know, no.

Q. You don't have any record at any rate?

A. There is no record of my doing so except the one exception.

Q. At the time in 1953 that the gall bladder

(Deposition of Dr. Paul M. Ellis.)

examinations were being made, were you present at those, Doctor, or not?

A. I couldn't say, I don't know.

Q. Don't have any record or notes about it?

A. No.

Q. Going on to this period of 1956 at the time there was an operation or a probing looking to the location of a foreign body in the abdomen of Elsie Summers, were you there?

A. I was present in the surgery as surgical assistant when the needle was removed.

Q. And I presume your recollection was the needle was found at the position as explained by Dr. Bonebrake at that time? A. Yes.

Q. Did you make any independent investigation to determine whether there was any scar tissue to determine whether the needle had moved prior to the operation?

A. The tissues were presented to my visual inspection at the time the needle was removed.

Q. And it did not show any trailing or moving of the needle in the body of the plaintiff, is that right? A. No. [4]

Q. Do you know whether that is—sometimes a layman is told that needles will travel through various parts of the body, is that possible?

A. I have never known it to happen; this being a round needle it would be a little difficult.

Q. For it to travel? A. Yes.

(Deposition of Dr. Paul M. Ellis.)

Q. You are connected as one of the members of the Wallace Hospital, you are one of the partners? A. Yes.

Q. I think that's all.

(Witness excused.)

/s/ PAUL M. ELLIS,
Deponent. [5]

[Endorsed]: Filed September 18, 1958.

[Title of District Courtand Cause.]

DEPOSITION OF ELSIE SUMMERS

Taken at Coeur d'Alene, Idaho, August 27, 1958, before Harold E. Peterson, Deputy Clerk of District Court, Kootenai County, Idaho.

Appearances: James W. Ingalls, Esq. and Messrs. Doepker and Hennessey, by Mark J. Doepker, Esq., for the plaintiff; Messrs. Hawkins and Miller, by E. L. Miller, Esq., for the defendants. [1]*

Deposition of Elsie Summers, a witness of lawful age, plaintiff in the above-entitled action, taken by the defendants in said action wherein Elsie Summers is plaintiff, and Wallace Hospital, Paul L. Ellis, Hubert E. Bonebrake, and Lewis B. Hunter, a co-partnership, and Hubert E. Bonebrake, M.D., individually, are the defendants, pending in the District Court of the United States for the Dis-

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* Page numbers appearing at bottom of page of Original Deposition.

trict of Idaho, Northern Division, pursuant to stipulation herein set forth by counsel for the respective parties present, before Harold E. Peterson, Deputy Clerk of the District Court in and for the County of Kootenai, State of Idaho, at Coeur d'Alene, Kootenai County, Idaho, on August 27, 1958.

Mr. Miller: Is it agreeable, gentlemen, for the record to state this is the time and place agreed upon by attorneys for plaintiff and attorney for defendants for the taking of the deposition of Mrs. Elsie Summers upon oral interrogation as an adverse witness under Rule 26 of the Federal Rules of Civil Procedure; that counsel reserves objections to all questions and answers except as to the form of the question; and that the deposition may be used or employed at any stage of this proceeding or at trial in accordance with the Rules of Federal Procedure? [2]

Mr. Doepker: Agreeable.

Mr. Miller: May the witness be sworn, and the record so show.

ELSIE SUMMERS

plaintiff in the above-entitled action, having been called for cross examination as an adverse witness by the defendants, being first duly sworn, testified as follows:

Cross Examination

Q. (By Mr. Miller): Mrs. Summers, would you please state your full name?

(Deposition of Elsie Summers.)

A. Elsie Summers.

Q. Where do you reside, Mrs. Summers?

A. Butte, Montana.

Q. What is your age? A. Forty-five.

Q. Are you married? A. Yes.

Q. Residing with your husband? A. Yes.

Q. I understand that you have some children?

A. Yes.

Q. How many children do you have?

A. Five.

Q. How many of them reside at home? [3]

A. There is two.

Q. What are their ages, the two that are at home? A. Well, twenty-one and twenty.

Q. They are employed? A. Yes.

Q. Self-sustaining? A. Yes.

Q. Are you employed, Mrs. Summers?

A. Yes.

Q. What is your occupation?

A. Practical nurse.

Q. Where are you employed?

A. County Hospital.

Q. Is that the name of the hospital?

A. Yes.

Q. That is located in Butte, Montana?

A. Yes.

Q. How long have you been employed there?

A. I have been employed since June.

Q. In what year? A. This year.

Q. Where were you employed before that?

A. Summit Valley Sanitarium.

(Deposition of Elsie Summers.)

Q. How long were you employed there?

A. A year. [4]

Q. Where is that? A. In Butte.

Q. Previous to your employment at the sanitarium, where had you been employed?

A. I was in the hospital.

Q. At Wallace or Kellogg? A. Wallace.

Q. In 1956? A. Yes.

Q. Prior to 1956, where were you employed—at the time you spoke of being in the hospital?

A. Will you repeat your question?

Q. Prior to the time in 1956 that you have testified you were hospitalized, where had you been employed?

A. I was—do you mean if I was living in Butte at the time?

Q. My question is: Prior to your being hospitalized, as you have testified to in 1956, where were you employed at that time?

A. Well, I had just moved to Butte.

Q. Did you leave your employment prior to moving to Butte? A. Yes.

Q. Where had you been employed at that time?

A. At the Sister's Hospital. [5]

Q. Where was that located?

A. In Wallace.

Q. Is there another name for that hospital?

A. Providence.

Q. How long had you been employed there?

A. I don't remember just exactly the amount

(Deposition of Elsie Summers.)

of time I was employed there. About a year, I think.

Q. Approximately twelve months, you would say? A. Yes.

Q. And previous to the time that you were employed at the Providence in Wallace, where had you been employed?

A. At the County Hospital in Wallace.

Q. How long were you employed there?

A. Since '47.

Q. Then you would have been at the County Hospital in 1951 or approximately that time?

A. Yes.

Q. Then you have spent how many years in your employment as a practical nurse?

A. Ten years.

Q. Where did you take the training for that?

A. In Wallace.

Q. Your first job was with the County Hospital?

A. Yes.

Q. What does your husband do? [6]

A. He is a boilermaker.

Q. By whom is he employed?

A. Victor Chemical.

Q. How long has he been employed by that organization? A. A year.

Q. Previous to that, where was he employed?

A. That is in Butte, Montana. A C M.

Q. How long had he been employed by them?

A. Three years.

(Deposition of Elsie Summers.)

Q. Previous to that, where had he been employed?

A. Day Mining Company in Wallace.

Q. How long was he employed by them?

A. I don't remember the exact time.

Q. Mrs. Summers, how long had Doctor Bonebrake acted as physician for you prior to 1951?

A. Since 1947.

Q. From 1957 through 1951?

A. That's right.

Q. He had been the physician for your entire family? A. That's right.

Q. In addition to Doctor Bonebrake, did you have occasion between 1947 and 1951 to contact other doctors at the Wallace Hospital?

A. Only if Dr. Bonebrake was out.

Q. Who would you then consult? [7]

A. Well, I saw Doctor Gnaedinger.

Q. Isn't it a fact that you consulted Doctor Hunter there too at that hospital at one time, Mrs. Summers, in that period of time, 1947 through 1951? A. No.

Q. You did not?

A. Well, yes, excuse me. I did. He entered me one evening.

Q. That was at the start of the difficulties you had in 1951 which later required surgery?

A. Yes.

Q. And you contacted him at or about what time, Mrs. Summers? Do you recall?

A. I don't know when exactly. Do you mean——

(Deposition of Elsie Summers.)

Q. When you saw Doctor Hunter.

A. (*D.B.) It was the 14th day of March of 1951.

Q. You have since yesterday examined the records and files and depositions in this case, have you not? A. I think so.

Q. Well, have you? A. Yes, I have.

Q. You have examined them and are acquainted with their contents? A. Yes.

Q. That was prior to your deposition here today? (D.B.) [8] A. Yes.

Q. Now, do you recall what your difficulties were at the time you saw Doctor Hunter?

A. Yes, I had pains in the abdomen and in the lower part of my back.

Q. Now, these back pains, you have had these for a period of years, have you not? A. No.

Q. But you had them when you saw him in 1951? A. No.

Q. Well, I asked what complaints you had at the time you saw Doctor Hunter—at the time you testified to. Your answer was that——

A. That was March of '51 we are referring to?

Q. Yes.

A. When I went in, I was sick.

Q. What were your complaints?

A. I didn't know what was wrong.

Q. Did you have back pains at that time?

A. No, not then. I did not.

Q. Did you have abdomen pains at that time?

A. No.

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* (D.B.) Refers to corrections on pages 148-149.

(Deposition of Elsie Summers.)

Q. Well, what was your condition for which you needed a physician's help?

A. Well, I was sick. [9]

Q. What were the manifestations or feelings that you had?

A. Well, I was just sick. I went to the doctor to see what was wrong.

Q. In what part of your body was the trouble?

A. My whole body.

Q. Then it would be your back too?

A. Well, my whole body. I was just sick, the way that I had been menstruating.

Q. You were having female trouble at that time?

A. If you want to call it that.

Q. Well, you were having some difficulty with your menstrual periods, were you not?

A. Yes. I was regular.

Q. Continuous? A. That is right, yes.

Q. Was that unusual for you? A. Yes.

Q. You saw Doctor Hunter for medical aid or treatment?

A. The night that I went to see him, it was late. He checked me in and he gave me some medicine and told me to go home.

Q. I see. Did you follow what he prescribed?

A. Yes.

Q. What did you do then? [10]

A. He said if it didn't help me to come in again.

Q. So Doctor Hunter prescribed for you?

A. Yes.

(Deposition of Elsie Summers.)

Q. In addition to your menstrual troubles, did you have other symptoms or pains?

A. No.

Q. It only was menstruation. Was that itself painful? A. Well, no.

Q. Then the only complaint you had was that you were menstruating unaccompanied by any pain? A. That's right.

Q. Now after you had taken the medicine, what did you do then?

A. I went back to the hospital.

Q. Whom did you see?

A. Doctor Bonebrake.

Q. Do you recall the date that you saw him?

A. No, I don't recall the date off-hand.

Q. Well, the month and year?

A. Not off-hand, I can't. Well, it was in March of '51.

Q. Well, isn't it a fact that you saw Doctor Bonebrake on or about the 25th day of March, 1951?

A. I believe that is right, and my operation was the 28th.

Q. And you had seen him several days before that time, on the 25th? [11]

A. I had seen Hunter.

Q. Well, you had seen Doctor Bonebrake after that? A. Yes.

Q. State whether or not you were or were not seeing him regularly? A. Yes.

(Deposition of Elsie Summers.)

Q. Now, at the time that you visited him after seeing Doctor Hunter, did he hospitalize you?

A. Yes.

Q. What was your difficulty?

A. Still menstruating.

Q. Is that the only complaint that you made to him? A. Yes.

Q. You did not complain of pain any place in your body? A. No.

Q. You are familiar, I presume, as a practical nurse with hospital records, and you understand how they are kept? A. Yes.

Q. And you understand they are kept on the basis of what the patient relates to the doctor?

A. Yes.

Q. You state that at or near that time you didn't complain to Doctor Bonebrake that you had had a pain in the vagina since about the 8th of February with a lower abdomen pain? [12]

A. If you were menstruating that much, you would get sore too.

Q. There would have been abdominal pains in this menstruation?

A. Well, I was menstruating so much, yes.

Q. When did you start to have this abdominal pain?

A. When I kept on menstruating, but I can't say just how long. I was just menstruating. It was after that operation I developed that lower abdominal pain. It was more in the vagina before.

Q. Well, the area you are referring to as the

(Deposition of Elsie Summers.)

abdomen is between the navel and the pubic region of the body? A. Yes.

Q. That is where this lower abdominal pain was located? A. Yes.

Q. Now, what treatment was given to you when you were hospitalized by Dr. Bonebrake at the time you testified to, Mrs. Summers?

A. Well, you mean the day they put me in for surgery?

Q. What kind of operation did you have?

A. Hysterectomy.

Q. Isn't it a fact that you had a vaginal exploratory prior to the hysterectomy?

A. Will you repeat that?

Q. Isn't it a fact the vaginal exploratory was [13] undertaken prior to the time that you were operated on for this hysterectomy condition?

A. That wasn't a separate operation; that was included in the operation.

Q. It was done at the same time?

A. It was before the operation was done.

Q. How many days before was that done?

A. I don't know.

Q. You don't recall the operation, being under an anesthesia for that purpose, were you not?

A. Yes.

Q. And being a practical nurse and so trained, you were interested in the result of that exploratory procedure? A. Yes.

Q. Did Doctor Bonebrake discuss it with you?

A. He told me I needed an operation.

(Deposition of Elsie Summers.)

Q. Did you have a discussion about the tissue that had been removed from you? A. Yes.

Q. You saw that? A. Yes.

Q. And you also discussed the reason why you needed surgery? A. Yes.

Q. And you agreed to it? [14]

A. Yes.

Q. And you knew it was necessary for your health and well-being? A. Yes.

Q. And you agreed to the surgery which was called for and required? A. Yes.

Q. Now when was this surgery performed upon you, Mrs. Summers?

A. 28th of March, '51.

Q. How long were you hospitalized after that?

A. Oh, a week.

Q. Approximately a week. Your recovery was uneventful? A. Yes.

Q. When you were discharged then after this week, how long was it before you resumed your employment?

A. Six months, approximately?

Q. During that time, did you see Doctor Bonebrake? A. Until he released me.

Q. When did he release you?

A. I don't know the date he released me.

Q. Was it in the six-month period?

A. Yes, before that, but I didn't go back to work for six months.

Q. What did you do? You told us you went back after six months. [15]

(Deposition of Elsie Summers.)

A. I went back to the County Hospital.

Q. You returned to your employment there?

A. Yes.

Q. Did this menstruating stop? A. Yes.

Q. And the discomfort associated with that diminished? A. For a few weeks it did.

Q. Did you go to see Doctor Bonebrake again about it? A. Yes.

Q. When was that?

A. About two months after the operation is when I went back.

Q. Approximately two months later you saw Doctor Bonebrake? A. Yes.

Q. Did he have his office records before him at the time he examined you?

A. I don't know.

Q. What examination did you have?

A. He put me in the hospital.

Q. What did he do?

A. He put me to bed. The nurses gave me a shot and hot pads. Five days I stayed in bed.

Q. Were you exrayed? [16]

A. No.

Q. Where was your pain?

A. Around the lower part of my abdomen, around the hips and back.

Q. What kind of treatment other than the shots and back treatment or heat did you receive?

A. That is all.

Q. At that time weren't you also troubled with stomach gas or stomach disturbances?

(Deposition of Elsie Summers.)

A. I was not.

Q. Now, when actually was the first time that you went back to the hospital after the operation?

A. I don't remember the date.

Q. The first time was not two months after the operation, was it, Mrs. Summers?

A. I know it was two months after the operation.

Q. Was that on or about the 31st day of July, 1952? That wouldn't have been the two months later? A. No.

Q. Well, the records——

A. I do know I went back two months after the operation.

Q. What hospital? A. Wallace.

Q. You were confined there for five days?

A. Yes, sir. [17]

Q. At that time you state the treatment that was prescribed for you was heating pad to your back plus a shot? A. That's right.

Q. And being a practical nurse, do you know what shot was being given to you?

A. No, I don't know because they didn't tell me.

Q. You paid no attention to that. Within this five-day period of time, were you or were you not comfortable? A. No.

Q. Did you make a complaint to anybody?

A. Yes.

Q. Who did you complain to?

A. My husband.

Q. Anyone else? A. My children.

(Deposition of Elsie Summers.)

Q. You never complained to Doctor Bonebrake?

A. No, I kept telling him I was hurting in the abdomen and back and hips. All across (indicating), between, and down in here.

Q. You are indicating from your hips to the center of your stomach, is that correct?

Mr. Doepker: We object. She is not indicating her hips at all.

Mr. Miller: She went from her hips to the center of her stomach and lower abdomen. I saw her motion, Counsel. [18]

Mr. Doepker: All right.

Q. After the time you related to us, Mrs. Summers, were you subsequently hospitalized?

A. Yes.

Q. When was that?

A. The date I don't know.

Q. Well, can you tell us if it was any proximity to the time that you described as occurring approximately two months after?

A. I think it was in November of 1952.

Q. What hospital were you placed in at that time? A. Wallace.

Q. Under whose care?

A. Doctor Bonebrake's.

Q. How many days were you there?

A. About five days.

Q. What complaint did you make at that time?

A. The same. My abdomen.

Q. Was that October of 1951? A. 1952.

(Deposition of Elsie Summers.)

Q. And the other time that you testified to you were hospitalized five days was in 1951?

A. The same, yes.

Q. In other words, if the operation was in March, '51, and you were hospitalized for five days in '52, and you went [19] again in November, what year are you speaking of now?

A. I am speaking of '52 now.

Q. Then your doctor was whom?

A. Doctor Bonebrake.

Q. What complaint did you have at that time?

A. Abdomen pain and in my back.

Q. Were you kept in the regular part of the hospital? A. Pardon?

Q. Were you kept in the regular part of the hospital?

A. In the women's ward. I was put to bed.

Q. You were subject to nurses' supervision?

A. Yes.

Q. They had a bed chart for you?

A. Yes.

Q. That was in 1952—November of 1952?

A. Yes.

Q. What treatment did you receive at this time?

A. The same.

Q. The same what?

A. Just put to bed. The shots and heat pads. No exrays.

Q. No exrays, and that was your entire treatment?

A. The first exray was taken in '52.

(Deposition of Elsie Summers.)

Q. We are speaking of November of 1952, Mrs. Summers.

A. In '52 there was one exray taken. [20]

Q. When was that taken?

A. I can't be sure of the month in '52 the first exray was taken.

Q. It was taken during the hospitalization treatment that you received?

A. What was your question?

Q. Was the exray related to the treatment you received while you were hospitalized?

A. Why sure.

Q. You testified that you were hospitalized in March of 1951 for the surgery. You testified that two months after, in May or June, that you were hospitalized again for treatment. A. Yes.

Q. You testified that the next hospitalization was in November of 1952 for treatment?

A. Yes.

Q. When was that exray taken?

A. When I went back in November of '52. I'm not sure of the date, but that was the first time an exray was taken.

Q. You were hospitalized at that time?

A. Yes.

Q. Now, were you working in 1952 at the hospital? A. Yes.

(D.B.) Q. Isn't it a fact that at or near that

(Deposition of Elsie Summers.)

time you sustained a head injury while working at the hospital? [21]

A. That has no bearing on this question.

Q. I would be the judge of that. You answer the question.

(D.B.) A. Yes, I had a head injury.

Q. At or near the time that you are referring to here? A. Yes.

(D.B.) Q. And that injury was caused by an object falling upon (D.B.) your head?

A. That's right.

Q. You had Doctor Bonebrake treat that injury? A. No.

Q. Who treated it?

A. The doctors at the Providence Hospital.

Q. Weren't the exrays taken at the Wallace Hospital at that time?

A. Yes. That was different. I had a finger broken.

Q. When was that?

A. I don't remember the month.

(D.B.) Q. Well, to refresh your recollection, was that the time that you turned the matter over to Mr. Taylor. Do you remember that?

A. Yes.

Q. When was that?

A. I don't remember the date.

Q. Was there subsequent litigation over that?

A. I think that happened in '53. [22]

Q. Was there litigation over that? A. No.

Q. Well, did you have a trial over the situation?

(Deposition of Elsie Summers.)

A. No.

Q. That is not with the broken finger?

A. No.

Q. Did you in fact have a hearing with the Industrial Accident Board?

A. That was through the Providence Hospital.

Q. Was it or was it not a trial? A. Yes.

Q. You were represented by Mr. Taylor?

A. I was represented through one in Boise and one in Wallace.

Q. You had two attorneys? A. Yes.

Q. Mr. Hull of Wallace was the other attorney?

A. No, Taylor was.

Q. Was Taylor your lawyer? A. Yes.

Q. Then Hull was the opposing counsel?

A. Yes, they are together.

Q. What do you mean "they are together"?

A. Well, they are in the same office. [23]

Q. Partners practicing together?

A. Yes, I think so.

Q. You do not have a very accurate memory of that? A. Not too much, no.

Q. In other words you have difficulty remembering the events happening so long ago in time as we are referring to?

A. With my hand, yes.

Q. But everything concerning or occurring during this time you have a good memory of otherwise?

(D.B.) A. Pretty good.

Q. Now, you said in November of 1952 you

(Deposition of Elsie Summers.)

made complaint of a lower abdominal pain, and you also were treated in the hospital within two months after the operation. Who was attending you in November 1952?

A. Doctor Bonebrake.

Q. Doctor Bonebrake? A. Yes.

Q. And when did you return to your employment? A. Three weeks later.

Q. Your records would show these dates that you speak of? A. Yes.

Q. You have no objection to our obtaining those records? A. If they have them.

Q. Do you know whether they have? [24]

A. No.

Q. Have you made inquiry so as to ascertain their availability? A. No.

Q. When was the next time you saw Doctor Bonebrake? Or any doctor at Wallace?

A. After 1952 I seen Doctor Bonebrake in 1953.

Q. What time and where and under what circumstances?

A. Well, as I say it was just the pain in my abdomen and back.

Q. The same pain in your abdomen and back?

A. Yes. He also took exrays for gall bladder.

Q. Were you hospitalized at that time?

A. It was out-patient treatment.

Q. Did you ever see the exrays he took, Mrs. Summers? You saw three of those yesterday?

A. Yes.

Q. You examined them last night?

(Deposition of Elsie Summers.)

A. No.

Q. Could you establish the approximate time you saw Doctor Bonebrake in 1953?

A. Do you want the month?

Q. Just the month is fine.

A. I'm afraid not.

Q. During this time were you still working, [25] Mrs. Summers? A. Yes.

Q. Now, after the examination for gall bladder, did Doctor Bonebrake prescribe any course of treatment for you? A. No.

Q. None at all? A. No.

Q. And what did you do?

A. Well, I didn't do anything. I was just suffering with my back.

Q. Just the back?

A. And the abdomen pain.

Q. When, if anytime after that, did you contact Doctor Bonebrake or his associates at Wallace Hospital?

A. I remember in '54 I went back with the same back and abdomen pains. I was suffering something fiercely.

Q. Did you see Doctor Bonebrake?

A. Doctor Gnaedinger admitted me.

Q. Prior to that entry you had some difficulty at home with your husband, isn't that true?

A. No.

Q. You hadn't had a dispute there before you came to the hospital crying and somewhat upset?

A. No.

(Deposition of Elsie Summers.)

Q. Now, you related to the doctor at that time, [26] Doctor Gnaedinger, the complaint that you had? A. That's right.

Q. You gave him the history?

A. That's right.

Q. Isn't it a fact that you at that time told him that you had been upset with some kind of trouble at home in the morning?

A. No. I don't know. No.

Q. Is it possible that you did? A. No.

Q. If the records so reflect, the records are inaccurate?

(D.B.) A. No.

Q. If the records so reflect that you made such a complaint, the records would then be inaccurate?

A. Whoever made that complaint — I know I didn't.

Q. What treatment did Doctor Gnaedinger prescribe?

A. The same as Doctor Bonebrake, he put me to bed the same way.

Q. Were there any examinations or exrays made of you? A. No.

Q. What treatment was given to you?

A. None.

Q. No treatment whatsoever?

A. None. [27]

Q. How many days were you hospitalized at that time, do you recall, Mrs. Summers?

A. Not any more than three or four days.

Q. For those three or four days you were in

(Deposition of Elsie Summers.)

the hospital under nurses' supervision and hospital records were kept, but so far as you know, no treatment was given to you?

A. That's right.

Q. Now, after 1954—strike that question. During that hospitalization, did you have occasion to see Doctor Bonebrake? A. Yes.

Q. Did he treat you at any time during that hospitalization?

A. He had shots and pills given and heat pads. I was in bed. Doctor Bonebrake came back to my bed.

Q. Now after that hospitalization, when was the next time that you were hospitalized?

(D.B.) A. I went back in August 1955.

Q. At any time between the time in 1954 and August, 1955, did you seek medical care or help?

A. I decided to change doctors.

Q. At about that time, wasn't there a large payment to be discharged for the Summers family owed at the Wallace Hospital? A. No.

Q. Isn't that one reason or the reason why you changed your doctor? [28] A. No.

Q. You never paid the bill at the Wallace Hospital? A. We were paying on it.

Q. Well, it was a sizeable bill that you owed there, isn't that a fact? A. Yes.

Q. And at that time, in August 1955, it was still a large bill? A. Not too bad.

Q. But it hadn't been paid?

A. We were paying on it.

(Deposition of Elsie Summers.)

Q. But there was some discussion about payment between your family and the hospital, was there not? A. Not to my knowledge.

Q. Not to your knowledge. Now, in August 1955, what doctor did you go to?

A. Doctor Cordwell at the Wardner Hospital in Kellogg.

Q. What were your complaints at that time?

A. Abdomen pains and my back.

Q. Isn't it true that your particular complaint was your infection or soreness in your vagina?

A. I had this abdomen pain so bad where I couldn't walk.

Q. Isn't it true that you told the doctor that your [29] vagina was very sore and you had pain there? A. It was abdomen pain.

Q. Would that in your opinion be reflected in the records now?

A. That's right; it would be.

Q. And isn't it a fact that at the time of that admission you had some pain for about a week before?

A. I had been suffering severely for a week, but I had it before.

Q. Did you tell the doctor you had this pain for that period of time? A. No.

Q. How long a period of time did you tell him you had it?

A. Ever since about four and a half or five years.

(Deposition of Elsie Summers.)

Q. Isn't it a fact that at that time you told him that you had similar trouble in 1949?

A. No.

Q. Were you hospitalized with Doctor Cordwell? A. I was.

Q. In the Wardner Hospital? A. Yes.

Q. What treatment did he prescribe for you?

A. Well, he prescribed several treatments.

Q. What was done to you? [30]

A. The next morning I had examination and exrays.

Q. That would be what date according to your recollection?

A. That was on the 5th of August.

Q. Well, were you treated for infection of the vaginal cavity? A. Yes.

Q. That treatment was continued with you for how long? A. A week.

Q. Medications were administered to that area?

A. That's right.

Q. And you were subsequently discharged a week later? A. Yes.

Q. Were you employed?

A. Not at that time.

Q. Were you still having the same pains?

A. My abdomen and my back. The exrays showed it and he found the surgical needle in me. Doctor Cordwell told my husband.

Q. Did he also tell you about it?

A. My husband didn't.

Q. Cordwell advised you of that.

A. Yes.

(Deposition of Elsie Summers.)

Q. You had some discussion with him about it?

A. Yes. [31]

Q. You heard his testimony which included his advice that in his opinion it was not causing any of the trouble of which you were complaining?

A. Yes.

Q. You heard the testimony to that effect?

A. I did not agree with that.

Q. You say the doctor is in error in making that statement under oath, and in your opinion that was causing the trouble? A. It was.

Q. And causing this infection of the pelvic area that you were complaining of? A. Yes.

Q. Did you know where this needle was located at anytime prior to August 1955?

A. I can't read exrays.

Q. You did not notice the needle at all at anytime until Cordwell found it and showed it to you —you knew nothing about it prior to that time?

A. I did not.

Q. Then at anytime prior to August of 1955, did you have knowledge there was or was not a needle? A. No, absolutely.

Q. Then you re-entered the Wardner Hospital some two days later? [32]

A. About a week later.

Q. He continued the same treatment to stop the soreness in the vagina and pelvic cavity?

A. Yes.

Q. You left there on August 30th?

A. Yes.

(Deposition of Elsie Summers.)

Q. Discharged? A. Yes.

Q. Were you at that time all right?

A. No.

Q. What was your trouble?

A. Still the same pains and soreness.

Q. You still had the same infection?

A. That's right.

Q. After you left, what doctors did you go to?

A. We moved to Butte.

Q. What doctor did you go to in Butte?

A. Doctor Macpherson.

Q. Were you under his care? A. No.

Q. What treatment did you receive?

A. I complained of my back and abdomen. He exrayed me.

Q. Will you please tell us what treatment you received?

A. Well, for treatments, I didn't have no treatment. When I complained of my abdomen, he took me in and examined me. [33]

Q. What treatment, if any, did he give you?

A. Well, he gave me an examination.

Q. Did he treat you? A. No.

Q. He found nothing which required treatment?

A. He gave me some medicine.

Q. What type of medicine?

A. I don't know. He didn't tell me.

Q. How did he administer these medicines?

A. I just took it.

Q. Orally? A. Orally.

Q. For your infection in your vagina, you

(Deposition of Elsie Summers.)

treated that with douches and other treatment prescribed under Doctor Macpherson?

A. He didn't prescribe douches. He tried to find the trouble, the pain in my back.

Q. Did he advise you at anytime that you have had an arthritic condition of the back for some years? A. No.

Q. Now, how long were you treated by Doctor Macpherson?

A. The first I seen Doctor Macpherson was January 4th of 1956.

Q. Then between the dates of August 30th, 1955, when Doctor Cordwell discharged you, and January 4th, 1956, you had [34] not been under the care of a physician?

A. I remember I had some pains. I was new in Butte. I was suffering. I had to just find a doctor. I just got him by random.

Q. Doctor Macpherson did not hospitalize you though? A. No.

Q. This treatment he administered to you was out-patient treatment? A. Yes.

Q. At no time while you were under his care were you hospitalized and treated? A. No.

Q. Is he still attending you?

A. Well, when I need him, yes.

Q. When did you next go to the doctor and enter any hospital?

A. I went to Doctor Macpherson on February 11th of 1956.

Q. You earlier date was incorrect?

(Deposition of Elsie Summers.)

A. No. That January 4th of '56 is when I first seen him. That is when he exrayed me, gave me my examination, and he also seen the needle.

Q. Well, you don't know that.

A. Yes, he showed it to me.

Q. What was it you actually saw?

A. Well, he showed it to me. [35]

Q. Now what happened on February 11, 1956?

A. I went back again. We were talking about the situation.

Q. All right, but then after that, what did you do?

A. He advised me to go back to Wallace to see Doctor Bonebrake.

Q. And you contacted him when?

A. Well, I don't know as my dates are just correct, but I'm not sure—I won't say for sure, but I think it was the latter part of February of '56, and the operation, I think, was performed the 20th of February, 1956.

(Recess.)

Q. I believe, Mrs. Summers, we left off before the recess at the date of approximately February 11th, 1956, when you saw Doctor Macpherson. Then did you or did you not see another doctor?

A. Yes.

Q. Who did you see?

A. Doctor Bonebrake.

Q. And what if anything was said at that time?

A. I told him that I had the surgical needle left in me during my hysterectomy operation in '51.

(Deposition of Elsie Summers.)

Q. What did Doctor Bonebrake say?

A. Well, let the technician find it.

Q. Did you have any other discussion than that?

A. No. [36]

Q. That was the entire conversation?

A. Yes.

Q. Were you exrayed again at that time?

A. Yes.

Q. What if anything was done?

A. He exrayed me in two or three different positions.

Q. I see. And did he show you those exrays?

A. No.

Q. He didn't show you the exrays?

A. No.

Q. Did you discuss the procedure for the removal of the needle? A. No.

Q. Did he show you where it was located?

A. Yes.

Q. Then he showed you the exrays?

A. He showed by his hand—motion of his hand just about where it was located, right down in here.

Q. Not within the abdominal cavity at all?

A. Yes, it was inside the abdomen.

Q. Do you know that for a fact?

A. Well, according to the exrays.

Q. You saw the exrays that he had?

A. I can't remember whether I seen them or the other doctor's exrays. [37]

Q. But isn't it a fact Doctor Bonebrake took some lateral exrays of you? A. Yes.

(Deposition of Elsie Summers.)

Q. You saw those exrays, didn't you, Mrs. Summers? A. No. I don't remember.

Q. Well, did you have some discussion with Doctor Bonebrake about the location being outside of the abdominal cavity?

A. No. It was inside the abdominal cavity.

Q. Did Doctor Bonebrake tell you that?

A. No.

Q. Who told you? A. Doctor Macpherson.

Q. He told you it was within the abdominal cavity? A. That's right.

Q. Now, did he take exrays? A. Yes.

Q. Did he take lateral exrays?

A. He said, "I found that within the abdominal cavity."

Q. Is Doctor Macpherson going to testify in this case? A. I can't answer that.

Q. To your knowledge, is he?

A. I don't know.

Q. Do you have any objection to our securing the exrays from Doctor Macpherson? [38]

A. No.

Q. You have no objection at all.

Mr. Doepker: We are going to have him available for his deposition, and you will have opportunity to see him and examine him before we go to trial on his findings.

Mr. Miller: She apparently has no objection to our sending interrogatories and obtaining the exrays, and we will so do.

Mr. Doepker: We will see whether you will. We

(Deposition of Elsie Summers.)

are running this case. We will find out whether it will be done or whether it can't be done.

Mr. Miller: Counsel apparently objects to the discovery procedure and our obtaining the exrays of Doctor Macpherson. The witness does not desire apparently to invoke the doctor-patient privilege.

Mr. Doepker: Let the record show the witness will waive the patient-physician privilege, and will present Doctor Macpherson as one of the plaintiff's witnesses under whatever order of the Federal Court is made. We prefer to have that conducted just the same as the proceedings have been conducted yesterday and today. Doctor Macpherson will have full consent of plaintiff to testify concerning his findings and everything in connection with his examination of the plaintiff without any objection on her part to his testifying. Just to [38] explain our purpose, I want to state our purpose is to have this proceed in an orderly fashion and not by writing a letter to him and having him answer a letter when we don't have a chance to be present there to preserve our rights at the examination. That is all.

Q. Now, you undoubtedly, when you contacted Doctor Macpherson on January 4th, 1956, told him that you had this needle in you?

A. That's right. I did.

Q. Did he exray you on January 4th or February 11th? A. January 4th.

(Deposition of Elsie Summers.)

Q. But he did not schedule any immediate surgery or removal?

A. He didn't make arrangement for it, no.

Q. And you returned to Doctor Bonebrake in February of 1956? A. That's right.

Q. And for that purpose? A. Yes.

Q. And you did so upon your own or upon the recommendation of Doctor Macpherson?

A. Yes.

Q. Which was your choice, or was it Doctor Macpherson's?

A. We both agreed he was the man to do it.

Q. You had full confidence that he would remove it? [40] A. Yes.

Q. You had no reluctance about going back to Doctor Bonebrake to have it removed?

A. I wanted to. He left it there. Doctor Macpherson suggested that he should.

Q. You felt that he was competent or you wouldn't have gone back?

A. Yes. Doctor Macpherson said I could have it removed by——

Q. I don't want you to volunteer any conversation with Doctor Macpherson. Now, you don't recall the removal because you were under an anesthetic? A. Yes.

Q. You were discharged within how many days?

A. Within three days.

Q. Where did you go then?

A. I had to get a place and stay until I was released.

(Deposition of Elsie Summers.)

Q. How long was it before you were released?

A. Close to two weeks.

Q. You remained in the Wallace area for two weeks? A. Yes.

Q. All that time you were in contact with Doctor Bonebrake? A. That's right.

Q. What was the purpose of that contact? [41]

A. I had to have the stitches taken out.

Q. When was that done?

A. I don't remember the date.

Q. Who did you stay with during that period of time? Did you have children down there at Wallace?

A. No. None of them lives there, not any more.

Q. And then did you return back to Butte, Mrs. Summers?

A. Well, as far as I can remember and my dates are not too incorrect, I believe we arrived in Butte on March 5th.

Q. That would be 1956? A. Yes, sir.

Q. Now, you returned to your employment there in Butte how long after that?

A. If my memory is right, three months. I'm sure the records will show that.

Q. Three months after March 5th—that would be sometime in June—you resumed your employment? A. Yes.

Q. And that employment has been continuous at all times since that date? A. Yes.

Q. Do you still see Doctor Macpherson?

(Deposition of Elsie Summers.)

A. He hasn't treated me since February 11th, 1956.

Q. Are you still troubled with infection?

A. No. I haven't had a pain about me since that was removed. [42]

Q. Now, all during this period of time, as the medical testimony shows, from 1949 through August 1955 you were having difficulties with infection. A. Not in '49. From '51 on.

Q. You heard Doctor Cordwell's testimony. You did give him a brief history before he treated you in August 1955?

A. That is incorrect. I didn't say anything was wrong with me in '49.

Q. And Doctor Cordwell's records would be incorrect if they so reflected?

A. Would you repeat that?

Q. Doctor Cordwell's records would be incorrect if they so reflect that?

A. That is incorrect—in '49.

Q. Now, you are acquainted with plaintiff's complaint filed in this matter on your behalf?

A. Yes.

Q. And I assume that the information herein contained was based on information that you gave to your attorneys? A. Yes.

Q. And I presume that prior to the filing of this action that you read and understood the complaint? A. Yes.

Q. And they filed it on your behalf? [43]

A. Yes.

(Deposition of Elsie Summers.)

Q. You approved it as it was framed?

A. Yes.

Q. Now, you, yourself, are satisfied that the uterus had to be removed by virtue of the conditions that were present in 1951? A. Yes.

Q. And you are satisfied insofar as the removal of the uterus and the other aspects of the hysterectomy are concerned, except for the needle?

A. That's right.

Q. You do not contend that the uterus was removed in any wrongful way?

A. Yes, on account of the needle.

Q. Discounting for a moment the needle, Mrs. Summers.

A. Well, you will have to repeat that.

Q. Forgetting the needle for a moment, in the removal of the uterus and the performance of this hysterectomy you have no complaint?

A. I have.

Q. You have a complaint?

A. Yes. Before I was released, Doctor Bonebrake told me I might have a malignant tumor. I worry about that, and that is all along, and it still is a worry. I now have spots that I pass even now. [44]

Q. When did he tell you that you might have a malignant tumor?

A. When he released me in 1951.

Q. Did he tell you where the tumor was located or was possibly located? A. No.

(Deposition of Elsie Summers.)

Q. You have been examined by other doctors?

A. No.

Q. Well, didn't Doctor Macpherson examine you? A. Yes.

Q. Didn't Doctor Cordwell examine you?

A. Yes.

Q. Didn't Doctor Gnaedinger examine you?

A. No.

Q. What doctors examined you between 1951 and 1956?

A. Doctor Bonebrake, Doctor Cordwell, and Doctor Macpherson.

Q. And Doctor Gnaedinger? A. No.

Q. And as a result of those examinations was there found anything of a tumor after the operation? A. No.

Q. As a matter of fact before the operation there was discussion between yourself and Doctor Bonebrake concerning this growth in your uterus, was there not? [45] A. Yes.

Q. At that time Doctor Bonebrake sent some tissue to the pathologist for study as to whether it was malignant, and you saw the report when it came back?

A. I didn't see the report.

Q. You discussed the contents of that report with Doctor Bonebrake, did you not?

A. No, I didn't discuss it.

Q. Isn't it a fact that Doctor Bonebrake told you that the report stated that this was non-cancerous and there was no pregnancy involved?

(Deposition of Elsie Summers.)

A. No, there was pregnancies involved.

Q. What did the report say?

A. He said I had pregnancy in the tubes in 1951, that he was going to remove it.

Q. He told you in 1951 that prior to that you had pregnancy of the tubes? A. Yes.

Q. Now what, if any, other complaints did you have then?

A. The complaint is I've got the worry I still have right now of discharging nothing but blood.

Q. You are not under a doctor's care?

A. No, I am not.

Q. And this discharge of the blood, do you think [46] that would in any way be related to the operation and to the needle?

A. After I had the removal of the needle, I had no stabbing pain.

Q. You said you had some pain before the operation, at the time that you were menstruating in 1951 and you went to see Doctor Hunter and told him that you had an abdominal pain. Now, do you still have the abdominal pain?

A. No.

Q. But you had some pain before the needle was there with menstruation. A. Yes.

Q. That menstruation was causing the pain?

A. That was before the operation.

Q. That is correct. Now you are menstruating, you still have that——

A. I'm not menstruating. I'm just having spots now and then.

(Deposition of Elsie Summers.)

Q. Well, how frequently?

A. Once every two months, maybe every three months.

Q. What complaints do you make as to the removal of the uterus then? A. None.

Q. All right, now, what other, if any, complaints do you make, Mrs. Summers? [47]

A. None, only just the bleeding I have now and then. That is the worry I have right now.

Q. Is it your belief that your bleeding is a result of this needle? A. Yes.

Q. That is your belief. A. Yes.

Q. Has any doctor expressed the opinion that was the cause of your bleeding? A. Yes.

Q. Which doctor? A. Macpherson.

Q. And you have been seeing Doctor Macpherson?

A. I haven't seen him since the needle was removed.

Q. Well, it doesn't make sense that you complain Doctor Macpherson told you that while the needle was still in the abdomen and after the needle was removed you still had this bleeding that you are telling us about, that Doctor Macpherson said that bleeding is a result of that needle. That is your testimony? A. That's right.

Q. Now in what part of your body do you contend this needle was located?

A. Inside the abdomen.

Q. Near what then? [48]

(Deposition of Elsie Summers.)

A. I don't know if it's near anything. Doctor Macpherson explained it.

Q. Then you must have some knowledge as to its location. A. No.

Q. You have none?

A. He didn't explain the location. He showed me through the exrays. It was through the abdomen.

Q. It was through the abdomen?

A. Inside of the abdomen.

Q. What female organs was it near?

A. Well, it had to be close to it. I don't know.

Q. You don't know.

A. I do know, but I can't think of the name of it right now. The tubes.

Q. Weren't your tubes removed?

A. The needle was in the place where the tubes was laying.

Q. What part of your body do you contend is scarred by virtue of this needle?

A. What was that question?

Q. What part of your body was scarred by the needle?

(D.B.) A. The uterus was scarred by the needle.

Q. All right. Where do you contend that you were cut or bruised by this needle?

A. The uterus. [49]

Q. Now when did the bleeding commence or the menstruation commence after the operation?

A. The first time I noticed it was in May of—

(Deposition of Elsie Summers.)

pardon me, in June of '56. That is the first time I noticed it.

Q. June of 1956? A. Yes.

Q. That was after the needle had been removed?

A. That's right.

Q. Now you have heretofore testified that Doctor Macpherson told you that bleeding was the result of the needle. You testified he told you that on January 4th or February 11th before the needle was removed. This needle was removed in February 1956. The bleeding commenced after the needle was removed. How was he able to in January or February advise you, Mrs. Summers, that your bleeding was the result of this needle?

A. Well, I had my dates wrong, but I do know Doctor Macpherson advised me to have the needle removed.

Q. But you had no bleeding at that time?

A. Yes, I did. If I am wrong as to the date, you will have to excuse me.

Q. Now, do you wish to change your testimony, that June of 1956 is not the time you commenced menstruating or the bleeding?

A. Yes. I believe it was before the needle was removed. That is right. [50]

Q. Would Doctor Macpherson's records show that, do you think?

A. I don't know. Doctor Macpherson told me to have the needle removed or it would have serious consequences.

Q. But at no time—in the time from 1951 until

(Deposition of Elsie Summers.)

on or about, I think, August 6, 1955, did you know that there was a needle located within your abdomen?

A. I didn't know there was any needle inside of me until Doctor Cordwell told me.

Q. Then your answer is that during that period of time you didn't know it was there?

A. But I knew I had something or I wouldn't have felt (D.B.) faint like I did.

Q. And you heard Doctor Cordwell's testimony concerning his diagnosis that your trouble was unrelated to the needle?

A. I can't help what Doctor Cordwell said.

Q. You must have been satisfied with Doctor Cordwell or you wouldn't have gone to him?

A. I went there because that was the hospital my husband had gone to.

Q. You went to him. You must have had confidence in him. Did you or did you not?

A. Yes, I had confidence in him.

Q. You thought he was a competent doctor? [51]

A. Yes.

Q. You still feel he is a competent doctor?

A. No.

Q. You do not? A. No.

Q. Then it was a matter of six or seven months after you discovered the needle that it was removed? A. Yes.

Q. In your complaint you allege that immediately thereafter and on or about August 9th, 1955, you submitted to an operation for removal of that

(Deposition of Elsie Summers.)

needle. Did you advise your attorneys of that fact?

A. No, sir.

Q. That is not the truth, is it?

A. Yes, I advised him. Read that question again, sir.

Q. It says in your complaint that plaintiff immediately thereafter, on or about August 9th, submitted to a further operation.

A. No, that is wrong. That was the wrong date.

Q. You have difficulty in recalling dates, do you not? A. No, I don't, not so much.

Q. Well,——

A. That is the wrong date.

Q. You certainly know it it was in February of 1956 the needle was removed? [52]

A. That's right.

Q. But if you couldn't remember when it was removed, it must not have been too an important event in your life. A. Yes, it was.

Q. But you had no memory of it? A. Yes.

Q. Now, after 1951, after the operation in 1951, how long was it before Doctor Bonebrake removed the stitches?

A. The hysterectomy you are talking about—eight to ten days.

Q. And thereafter he did nothing so far as treatment of that was concerned?

A. I was with Doctor Bonebrake from the time I was operated on until the time I moved to Butte.

Q. How many times would you say you went to him? You examined the records yesterday. You

(Deposition of Elsie Summers.)

should know, Mrs. Summers, when you saw Doctor Bonebrake.

A. I didn't examine the records yesterday.

Q. Well, then, tell us from your own recollection. A. I seen him numerous times.

Q. Everytime that you went to him, what did you complain of?

A. Of my abdomen and back pains.

Q. Now, let's get the dates straight. Actually you had the first operation in the hospital with Doctor Bonebrake on [53] or about March 25th, 1951, isn't that true?

A. March 14th. I was released on the 17th of March.

Q. March 14th. The next time was March 25th, 1951, isn't that right? A. Yes.

Q. And then next was July of 1952?

A. That was when the first exray was taken.

Q. You remember that now? A. Yes.

Q. That was the next time you were under Doctor Bonebrake's care in the hospital?

A. It was when that first exray was taken.

Q. In July of 1952? A. Yes.

Q. Then the next time in the hospital was in November of 1954 under Doctor Gnaedinger?

A. I went to Doctor Bonebrake in 1953.

Q. That was on a matter concerning your hand?

A. No, gall bladder trouble.

Q. Then the next time—I am speaking about when you were hospitalized now—was in November of 1954? A. Yes.

(Deposition of Elsie Summers.)

Q. The last time was in February of 1956?

A. That was when I was hospitalized, yes, and I had seen him other times in his office. [54]

Q. You were never hospitalized two months after the operation in 1951, were you?

A. The first pain was two months after; I went to the hospital to see Doctor Bonebrake.

Mr. Miller: May we have the question please, Mr. Reporter?

Mr. Doepker: We contend she has answered the question.

Mr. Miller: Read the question, Mr. Reporter.

(Question read.)

The Witness: I don't remember.

Q. Your earlier testimony to that effect was not based upon any present recollection you have of that?

A. I don't know. I do know I was back in to see him.

Q. You have no recollection as to having been in the hospital in November of 1953 with Doctor Bonebrake? A. I was not in '53.

Q. Your earlier testimony as to that is incorrect?

Mr. Doepker: We challenge that. I don't think the record will show that in 1953.

Mr. Miller: The record will show that her testimony is that she was in the hospital in '53; that is, she testified earlier she was in the hospital in 1953.

Mr. Doepker: All right. We are not going to argue. Let the record show what she said.

(Deposition of Elsie Summers.)

Mr. Miller: That is right. Read the question.

(Question read.) [55]

The Witness: I don't remember.

Q. Well, it is either a yes or no answer. Will you please answer yes or no. A. No.

Q. It's not incorrect?

A. You mean if I was in the hospital in '53?

Q. Whether your earlier testimony that you have given here relating to being in the hospital in 1953 is the truth. A. No, I wasn't.

Q. It was not the truth?

A. No, I wasn't in the hospital.

Q. Then your answer is yes, it was not the truth?

A. It isn't. I wasn't in the hospital.

Q. Well, then, I take it, in conclusion, Mrs. Summers, that your complaint is the needle?

A. That's right.

Q. Would you have any recollection whether or not in July of 1952 you were admitted to the Wallace Hospital advising Doctor Bonebrake you only had had pains for approximately twenty-four hours prior to admission?

A. Will you repeat that question?

Mr. Miller: Read the question, please.

(Question read.)

The Witness: No, I don't recall that. [56]

Q. You have no recollection of that?

A. No.

Q. Being a practical nurse, as you have testified,

(Deposition of Elsie Summers.)

you have some knowledge of the makeup of the human anatomy, do you not?

A. Well, I don't work in surgery.

Q. Well, you have some general idea. Even a lawyer will gain some knowledge of it.

A. Yes.

Q. You understand that a hysterectomy is the removal of the uterus? A. Yes.

Q. You understand that yours was removed in 1951? A. Yes.

Q. And your testimony is that the needle cut, scarred, or hurt that uterus—that was not based upon memory? A. Yes, it was.

Q. What do you mean, Mrs. Summers? Would you please explain that?

(D.B.) A. Well, my uterus was scarred by the needle.

Q. Well, it was removed before the needle was there.

A. I didn't get your question. I answered wrong. I didn't get your question. That is the reason I answered wrong. Repeat your question.

Mr. Miller: Read the question to her. [57]

(Question read: "And your testimony is that the needle cut, scarred, or hurt that uterus—that was not based upon memory?")

The Witness: No, it wasn't.

Mr. Miller: That is all.

/s/ ELSIE SUMMERS.

(Deposition of Elsie Summers.)

State of Montana
County of Silver Bow—ss.

Subscribed and sworn to before me this 23rd day of September, A. D. 1958.

/s/ DAN BURKIRCH,
Deputy Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow. [58]

Mrs. Elsie Summers requested the following corrections:

Page 8, line 17, to page 9, line should read:

I have not personally examined the records mentioned but I was present in Court while they were shown to Dr. Bonebrake and heard his testimony about the records.

Page 21, line 24: This is not "head injury"; it was "hand injury."

Page 22, line 4: This should be "hand injury."

Page 22, lines 7 and 8: Should be hand "injury."

Page 22, line 16: Should be regarding "hand injury"; not finger.

Page 23: Should refer exclusively to "hand injury"; not finger.

Page 24 down to line 10 is regarding hand injury.

Page 27, line 13: The answer should be "yes."

(Deposition of Elsie Summers.)

Page 28, line 17: The answer should explain that I went to the hospital at Kellogg, Idaho.

Page 49, line 22 to 25: This should read "the place where the uterus had been prior to removal."

Page 51, line 14: This should be "pain" instead of "faint."

Page 57, line 20: Should read "the place where the uterus had been prior to removal."

/s/ DAN BURKIRCH,
Deputy Clerk of the District Court of the Second Judicial District of the State of Montana, in and for the County of Silver Bow.

Certificate of Court Reporter

I, Robert E. Bruner, Do Hereby Certify that I am one of the District Court Reporters for the Eighth Judicial District of the State of Idaho; that I took down in shorthand the deposition of Elsie Summers before Harold E. Peterson, Deputy Clerk of the District Court, Kootenai County, Idaho, at Coeur d'Alene, Kootenai County, Idaho, on August 27th, 1958; and that the above and foregoing transcript is a full, true and correct record of the oral testimony of said witness given as aforesaid, and of all objections and/or stipulations made or entered into at said hearing.

(Deposition of Elsie Summers.)

I Further Certify that I am neither attorney for or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In Witness Whereof, I have hereunto set my hand this 30th day of August, A. D. 1958.

/s/ ROBERT E. BRUNER,
District Court Reporter, Eighth Judicial District
State of Idaho. [60]

[Endorsed]: Filed October 1, 1958.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

This matter was tried before the Honorable Chase A. Clark, Chief Judge, United States District Court, sitting with a jury, at Coeur d'Alene, Idaho, on November 12, 1958, at 10:00 a.m.

Appearances: Doepker and Hennessey, Butte, Montana, James W. Ingalls, Esq., Coeur d'Alene, Idaho, Attorneys for Plaintiff; Hawkins and Miller, Coeur d'Alene, Idaho, Attorneys for Defendants. [1]*

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* Page numbers appearing at foot of page of original certified Transcript of Record.

November 12, 1958, 10 A.M.

(Selection of Jury.)

(Opening Statement by Mr. Doepker.)

The Court: We will recess at this time before starting on the testimony, for fifteen minutes.

(Admonition to the jury.)

10:45 A.M., November 12, 1958

ELSIE SUMMERS

called as a witness by the Plaintiff, after being first duly sworn testifies as follows:

Direct Examination

Q. (By Mr. Doepker): Now, in giving your testimony I wish you would talk so that the jury and the Judge can hear it. I will start by asking you to tell the Court and jury your name?

A. My name is Elsie Summers.

Q. And where do you live Mrs. Summers, at the present time?

A. I live at 3036 Carter, Butte, Montana.

Q. How long have you resided in Butte, Montana? A. Since September 1955.

Q. What was the approximate date of your birth,—what year were you born?

A. I was born December 26, 1913.

Q. Have you been married? A. Yes. [3]

Q. What is your husband's name?

A. His name is Arthur L. Summers.

Q. When were you and he married?

A. August 2, 1930.

(Testimony of Elsie Summers.)

Q. And as a result of your marriage do you have any children? A. Yes.

Q. Will you, very briefly, name them and give their ages?

A. Eldon is the oldest, he is twenty-six; Wayne is the next and he is twenty-three; Keith is next and he is twenty-two; Gill is twenty-one and Marion, the youngest, is 19.

Q. Did you folks ever reside elsewhere beside Butte, Montana? A. Yes, sir.

Q. And where? A. Wallace, Idaho.

Q. Did you reside at other places beside Wallace, Idaho? A. Yes.

Q. Where was that?

A. It was Emmett, Idaho.

Q. Is that near Boise? A. Yes.

Q. Now, during this period of time that you have related to the jury, during the time that the children were born, did you obtain any training,—any special training of any kind? A. Yes. [4]

Q. What was the nature of that training?

A. It was training as a practical nurse.

Q. And approximately when did you start to take that training Mrs. Summers?

A. That was in 1939.

Q. During that time that you were taking this training as a nurse who was doing your housework? A. I, myself, was.

Q. These boys are they all in good health?

A. Yes.

Q. Now, Mrs. Summers, what was the condition

(Testimony of Elsie Summers.)

of your health, generally, during that period of time, we will say, up until approximately the year 1951? A. I was in good health.

Q. Did you do some practical nursing from time to time? A. Yes.

Q. Did something unusual, or did something happen in the year 1951? A. Yes.

Q. Relate briefly to the jury what that was, referring to the early part of the year 1951?

A. Well, around in 1951 I was menstruating and I seem to wouldn't quit and I just kept on and kept on and so I got a very severe backache through this menstruation and so I went to the [5] doctor in Wallace, Idaho and——

Q. All right now, up to that point,—before this time who had been your family physician?

A. Doctor Bonebrake.

Q. Is that Doctor Hubert E. Bonebrake, one of the defendants here? A. That's right.

Q. And during that period of time where was he practicing? A. Wallace, Idaho.

Q. And were there other doctors there at this same Wallace Hospital? A. Yes.

Q. That you had occasion to consult?

A. Yes.

Q. Do you remember their names? A. Yes.

Q. Will you tell the jury what they were?

A. Doctor Hunter and Doctor Ellis.

Q. Now, Mrs. Summers, you have related this matter that you have thus far told the jury, now,

(Testimony of Elsie Summers.)

you went to who, in connection with this trouble you were having?

Mr. Miller: To which we object, your Honor, on the ground that it is immaterial, not being within the time period of July 30, 1955 and July 7, 1957.

The Court: The objection will be sustained. [6]

Q. Now, then Mrs. Summers, at the time that you were in the—the time that you went to the hospital in 1951, what, if anything, was done?

Mr. Miller: Just a minute. Now, your Honor, I renew my objection that this testimony is incompetent and immaterial to any issue in this case. The inclusive dates are July 30, 1955 up until July 30, 1957.

Mr. Doepker: Your Honor made a ruling on that previously.

The Court: I made a ruling on that but I made a ruling on the complaint, the complaint was very indefinite. I made the ruling on the complaint, that the statute did not start to run until the date of the last treatment by the defendants here. In other words, that the date of the first operation would not be controlling and that as to her continuous treatment, it would be at the end of her continuous treatment. The Idaho Supreme Court has ruled a little differently in a great many decisions on it. This case depends on this question: When did she receive the last treatment from these doctors, and until that is established I would have to sustain the objection.

Q. Passing from the question we are now [7]

(Testimony of Elsie Summers.)

asking you Mrs. Summers,—when did you last see Doctor Bonebrake in connection with any matter,—back to the last time you saw him?

A. I seen Doctor Bonebrake in February 1956.

Q. And at that time, what, if anything did he do? A. He removed the needle.

Q. Do you have the needle now?

A. Yes, I have.

Q. Where did you obtain it?

A. From Doctor Bonebrake.

Q. At that time?

A. Right after I recuperated in the hospital I asked him if I could have it and he said "yes."

Q. Where is that needle now?

A. It is in my possession now.

Q. Have you got it with you on the stand?

A. Yes.

Q. Will you produce it please?

(Witness produced article.)

(Plaintiff's exhibit 1, marked.)

Q. There is being shown to you at this time Mrs. Summers, an object and the paper that it is attached to has been marked Plaintiff's exhibit 1, will you state what that is?

A. It is a surgical needle. [8]

Q. You have been testifying about a needle that was handed to you by Doctor Bonebrake?

A. Yes.

Q. And is that the needle that was handed to you by him? A. Yes.

Q. As the needle that had been removed from you? A. Yes.

(Testimony of Elsie Summers.)

Q. Have you done anything with it except keep it since that time? A. I have not.

Mr. Doepker: We offer it in evidence.

Mr. Miller: Objected to as incompetent, irrelevant and immaterial. There is no contention in the complaint, or allegation in the complaint that the needle was wrongfully removed.

The Court: There is no allegation of any negligence on the part of the Doctor in removing this needle. The objection will be sustained.

Q. Going back now from the removal of that needle Mrs. Summers, how long did you treat with Doctor Bonebrake before this time in 1956?

A. Continuously through 1951 to 1956 until I moved to Butte.

Q. And what were you coming to him about?

A. I was worried, I was afraid of cancer. I had severe pains through my abdomen and across my hips. I couldn't stand; I couldn't walk; I couldn't sweep the floor and I was in misery all the time. I was crying all the time. I wasn't a housewife, I couldn't be. I wasn't a mother. I had seen so many cancer patients——

Q. ——All right now, how many times during this period of time did you consult with Doctor Bonebrake about this situation?

A. All the time. I was in constant care with him.

Q. And back from the year 1956 did you consult him continually about this matter,—about this trouble you are relating? A. Yes.

(Testimony of Elsie Summers.)

Mr. Miller: I object to the question as being indefinite and immaterial until the time is set and established,—what time they are talking about.

The Court: Yes, the time is the element in this case that will have to be considered.

Q. Well, now, go back and give to the jury your best memory of the times that you consulted with Doctor Bonebrake during this period of time about the subject you are testifying about?

A. Do you mean after my operation?

Q. Now, you have to come from the time you testified that the needle was removed back to the operation. [10] Give us the times that you saw him about it?

A. Well, in 1954 I was in constant care with him. In '53 I was in constant care with him and in '52 I was in constant care with him, always going back once and twice a month.

Q. And what about the year 1951?

A. In 1951 two months after the operation I was back with a severe pain in my abdomen.

Q. And during that period of time was that the thing that you were seeing Doctor Bonebrake about?

A. I was seeing Doctor Bonebrake about the severe pain I had. I didn't know what was wrong only I knew that I was suffering with severe pain and agony.

Q. Now, then, subsequent,—I mean before this period in 1956, did you have any other medical attention? A. No, sir.

(Testimony of Elsie Summers.)

Q. I mean in the year 1955?

A. In 1955 I was to the Wardner Hospital to see Doctor Cordwell over this same agony and pain, he took x-rays and he discovered the needle.

Q. All right, this x-ray that Doctor Cordwell took was taken at what time?

A. It was taken at 8 o'clock in the morning in 1955, August 5th.

Q. On the 5th day of August, is that right?

A. That's right. [11]

Q. Now then, after this time in 1955 what did you do then?

Mr. Miller: Now, your Honor, I object to this as incompetent, irrelevant and immaterial, and move to strike all the testimony of the witness on the ground that she has testified that the last time she saw Doctor Bonebrake or the other defendants was the year 1954 and the testimony therefore would be immaterial.

Mr. Doepker: The last time she saw him was in '56 your Honor.

The Court: The matter isn't exactly clear. I understood her testimony was 1951, '52, '53 and '54 she saw the Doctor and then she didn't consult him any more but changed doctors and then came back to him in 1956, is that right? The testimony is a little hazy the way she has been giving it.

Q. What about the year 1955 up until August, where were you at that time? Where were you living?

A. We were in Wallace, Idaho.

(Testimony of Elsie Summers.)

Q. And during this period of time were you not consulting Doctor Bonebrake? A. I was.

Q. Will you relate how it happened that you went to some other doctor?

A. Yes. My husband had changed jobs and I went to the [12] Wardner Hospital to Doctor Cordwell. I got a very sharp severe pain and I was paralyzed from my hips down, I couldn't——

Mr. Miller: Just a second. I object and move the answer be stricken as not being responsive.

The Court: The answer may stand.

Q. And was that the occasion that you went to see Doctor Cordwell? A. Yes.

Q. That you related? A. Yes.

Q. Now, Mrs. Summers, what was the start of this episode with Doctor Bonebrake, going back to the start that you were treating with him during this period of time?

Mr. Miller: To which I object, your Honor, as being incompetent, irrelevant and immaterial. There is no showing here that there has been any treatment by Doctor Bonebrake or the other defendants within the two-year period between the filing of the action and July 30, 1955.

The Court: The objection will be sustained.

Mr. Doepker: May we present a matter your Honor, out of the presence of the jury?

The Court: Yes. The jury will be [13] excused for a few minutes and I will hear counsel.

(In the absence of the jury:)

Mr. Doepker: Your Honor, we understand from

(Testimony of Elsie Summers.)
the testimony at this time, that the Plaintiff was under treatment by the Defendant up until a few days before this episode when she was taken over to the Wardner Hospital. This complaint was filed in July of 1957; that she had been continuously treating with Doctor Bonebrake up until this episode that she related on the 5th of August.

The Court: She hasn't fixed the time that she last treated with Doctor Bonebrake in connection with this operation that was performed on her in 1951.

Mr. Miller: Your Honor, I think there is a matter here that should come to the attention of the Court. There have been depositions taken in this case and they have been published. I understood the witness to state in answer to counsel's question that she was treated by Doctor Bonebrake in 1954, 1953 and 1952 and in 1951, which would be compatible to the testimony given on deposition. I refer to page 26 of her deposition where it is stated: "When, if anytime after that, did you contact Doctor Bonebrake or his associates at Wallace Hospital?" Her answer was: "I remember in 1954 I went back with the same back and abdomen pains. I was suffering something fiercely." [14] She was thereafter asked,—on page 28 of the same deposition, as follows; having described a hospitalization with Doctor Gnaedinger: "Now, after that hospitalization, when was the next time you were hospitalized?" Her answer was: "I went back in August 1955." "At anytime between the time in

(Testimony of Elsie Summers.)

1954 and August 1955 did you seek medical care or help?" Her answer: "I decided to change doctors." She had gone to Doctor Cordwell. Now, I don't think we want to get into anything of a more serious nature than that. Your Honor, it is our position that only those treatments which can be shown to have occurred between the dates of July 30, 1955 and July 30, 1957, being the date of the filing of this action, would be competent or material evidence in this action.

The Court: That is the position the Court will take in the trial of this case. Mr. Bailiff, you may call the jury back.

(In the presence of the jury:)

Q. Mrs. Summers, in order to fix the definite time, now, between 1956 and between August 5, 1955 back toward '51 when did you last see Doctor Bonebrake about this trouble in your abdomen?

Mr. Miller: Your Honor, I am going to object to that as impeaching his own witness. She has already testified that November 1954 was when she was treated by Doctor Bonebrake. [15]

The Court: Well, maybe her testimony will be the same. She may answer.

A. As I said, I was in contact with Doctor Bonebrake through 1954, '53, '52.

Q. And what part of '55?

Mr. Miller: Objected to as leading and suggestive and attempting to impeach his own witness.

The Court: Yes, she said '54, '53 and '52. Don't lead your witness.

Mr. Doepker: Your Honor, that's the case, if that's the ruling.

The Court: I will have to abide by the ruling I have made. Any testimony regarding any negligence of these doctors prior to July 29, 1955, unless it was connected up with later negligence is barred by the Statute of Limitations, if that is your case——

Mr. Miller: Your Honor, I move to dismiss the complaint of the plaintiff and further move for entry of judgment in favor of the defendants according to law. Strike that please. I will move for the entry of summary judgment based upon the testimony of the plaintiff to the effect that 1954 was the last treatment by the defendants.

The Court: It is a matter of [16] procedure whether the jury should be instructed to bring in a verdict for the defendants.

Mr. Miller: Your Honor, I will withdraw my earlier motion.

Mr. Doepker: May I have a moment to confer with Mr. Ingalls?

The Court: Yes, you may. We will just be at ease.

Mr. Ingalls: May we have a brief recess? We may be able to bring out something further.

Mr. Miller: I don't think there is anything that can be brought out by the plaintiff in view of the record.

The Court: I don't see how a recess will help any. The Court has ruled that these acts of negligence against the defendants would have had to

have been after July 29, 1955. However, I will take a recess for ten minutes.

November 12, 1958, 11:30 A.M.

Mr. Doepker: Your Honor, we would like to make an offer of proof, if we may, at this time. We will write it out and present it to counsel and your Honor. Is that the practice you use here?

The Court: No, I can excuse the jury and you can dictate it into the record here. [17] The jury may be excused again for a few minutes and the bailiff will call you later.

(In the absence of the jury:)

Mr. Doepker: Now comes the Plaintiff and offers to prove by the witness on the stand and the testimony of her husband, Arthur Lee Summers, that the Wallace Hospital and Doctor Bonebrake, continued as the family physician of Plaintiff and her family until and including the month of July 1955, and that she did not discover that a surgical needle was imbedded in her abdomen until August 5, 1955, when an x-ray was taken by Doctor Cordwell, which disclosed the presence of the surgical needle which has been marked as an exhibit here and offered in evidence.

The Court: The fact that they were her doctors during the time that you have admitted or proposed in this offer,—I realize that there is a great weight of authority that the cause of action accrues at the time of the discovery and there seems to be a great weight of opinion that the statute doesn't start to run until the discovery but she has not testified to seeing these doctors before she trans-

ferred over to the other doctor. Her testimony is quite clear on it,—whether they remained as her physicians or not wouldn't make any difference. It would be a question of whether she consulted [18] with them in connection with this pain, and from the testimony here it is apparent that she didn't consult with them after July 29, 1955, until she returned to them for the operation, so I have to go along with the Supreme Court in their decision that some act of negligence on their part would have to be proved since July 29, 1955. You may recall the jury.

(In the presence of the jury.)

The Court: Ladies and gentlemen of the jury, it appears from the evidence in this case that there has been no act of negligence shown against the Wallace Hospital and the Doctors here since July 29, 1955. Under the law people are not allowed to have an action of this kind and let it lay dormant for such a long time. Plaintiff here is complaining about an operation in 1951, and the last treatment, it is admitted, that she received from these Doctors in connection with this first operation was prior to July 29, 1955. The operation where they removed the needle later,—there is no contention on the part of the Plaintiff that there was any negligence in that operation. That operation was satisfactory in every way. So there is only one thing that is left open to me and that is to advise the jury to find for the Defendants in this case. The Clerk will hand you a verdict. There will be no necessity for you [19] to retire. I will appoint Mr. Rich as foreman of the jury and he may sign the verdict.

Mr. Doepker: Your Honor, will you grant the Plaintiff an exception to the ruling of the Court?

The Court: You have that without the Court granting it. Whenever the Court is wrong you have an exception. You were relying entirely upon the discovery, I take it.

Mr. Doepker: We were relying on the fact that she didn't know anything about this needle until the 5th of August 1955.

The Court: There is some very good authority to support you in that, but it happens that the Supreme Court of Idaho says differently.

The verdict may be filed. Ladies and gentlemen of the jury, I want to thank you for the attention you have given this matter. I will excuse you at this time until two o'clock this afternoon. [20]

[Endorsed]: Filed January 26, 1959.

[Endorsed]: No. 16400. United States Court of Appeals for the Ninth Circuit. Elsie Summers, Appellant, vs. Wallace Hospital, Paul L. Ellis, Hubert E. Bonebrake and Lewis B. Hunter, a co-partnership and Hubert E. Bonebrake, M.D., individually, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Northern Division.

Filed: January 29, 1959.

Docketed: March 10, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16400

ELSIE SUMMERS, Plaintiff,

vs.

WALLACE HOSPITAL, Defendant.

STATEMENT OF POINTS ON APPEAL

Plaintiffs-Appellants herewith present the points upon which they claim the Court erred:

1. In granting the defendants' motion to direct the jury to render a verdict for the defendants. (Pages 19 & 20, Transcript.)

2. In directing the jury to render a verdict for the defendants. (Pages 19 & 20, Transcript.)

3. In entering judgment that plaintiff take nothing by her complaint.

4. In restricting and limiting the evidence of plaintiff to acts or actions of defendants which occurred within two (2) years from the institution of suit, or between the dates of July 30, 1955, and July 30, 1957.

5. In rejecting plaintiff's offer in evidence of plaintiff's exhibit No. 1, which is set out in the Transcript on pages 8 and 9, as follows:

"Q. There is being shown to you at this time, Mrs. Summers, an object, and the paper that it is attached to has been marked 'Plaintiff's Exhibit 1.' Will you state what that is?

"A. It is a surgical needle.

"Q. You have been testifying about a needle that was handed to you by Doctor Bonebrake?

"A. Yes.

"Q. And is that the needle that was handed to you by him?

"A. Yes.

"Q. As the needle that had been removed from you?

"A. Yes.

"Q. Have you done anything with it except keep it since that time?

"A. I have not.

"Mr. Doepker: We offer it in evidence.

"Mr. Miller: Objected to as incompetent, irrelevant and immaterial. There is no contention in the complaint, or allegation in the complaint, that the needle was wrongfully removed.

"The Court: There is no allegation of any negligence on the part of the Doctor in removing this needle. The objection will be sustained."

6. In sustaining defendants' objections to testimony relating to acts of negligence of the defendants prior to July 30, 1955, which testimony and the objections and rulings are hereafter quoted:

"Q. Did something unusual, or did something happen in the year 1951?

"A. Yes.

"Q. Relate briefly to the jury what that was, referring to the early part of the year 1951?

"A. Well, around in 1951 I was menstruating and I seem to wouldn't quit and I just kept on

and kept on, and so I got a very severe backache through this menstruation and so I went to the Doctor in Wallace, Idaho, and——

"Q. All right now, up to that point,—before this time who had been your family physician?

"A. Doctor Bonebrake.

"Q. Is that Doctor Hubert E. Bonebrake, one of the defendants here?

"A. That's right.

"Q. And during that period of time, where was he practicing?

"A. Wallace, Idaho.

"Q. And were there other Doctors there at this same Wallace Hospital?

"A. Yes.

"Q. That you had occasion to consult?

"A. Yes.

"Q. Do you remember their names?

"A. Yes.

"Q. Will you tell the Jury what they were?

"A. Doctor Hunter and Doctor Ellis.

"Q. Now, Mrs. Summers, you have related this matter that you have thus far told the Jury, now, you went to who, in connection with this trouble you were having?

"Mr. Miller: To which we object, your Honor, on the ground that it is immaterial, not being within the time period of July 30, 1955, and July 7, 1957.

"The Court: The objection will be sustained.

"Q. Now, then Mrs. Summers, at the time that

you were in the—the time that you went to the hospital in 1951, what, if anything was done?

"Mr. Miller: Just a minute, now, your Honor, I renew my objection that this testimony is incompetent and immaterial to any issue in this case. The inclusive dates are July 30, 1955, up until July 30, 1957.

"Mr. Doepker: Your Honor made a ruling on that previously.

"The Court: I made a ruling on that but I made a ruling on the complaint, the complaint was very indefinite. I made the ruling on the complaint, that the statute did not start to run until the date of the last treatment by the defendants here. In other words, that the date of the first operation would not be controlling and that as to her continuous treatment, it would be at the end of her continuous treatment. The Idaho Supreme Court has ruled a little differently in a great many decisions on it. This case depends on this question: When did she receive the last treatment from these Doctors, and until that is established I would have to sustain the objection."

(Pages 5 through 7, Transcript.)

"Q. Now, Mrs. Summers, what was the start of this episode with Doctor Bonebrake, going back to the start that you were treating with him during this period of time?

"Mr. Miller: To which I object, your Honor, as being incompetent, irrelevant and immaterial.

There is no showing here that there has been any treatment by Doctor Bonebrake or the other defendants within the two-year period between the filing of the action and July 30, 1955.

"The Court: The objection will be sustained."

(Page 13, Transcript.)

7. In rejecting plaintiff's offer of proof. (Page 18, Transcript.)

8. In granting in effect, or in fact, defendants' motion to limit evidence, dated November 5, 1958.

9. In holding the recovery for acts of negligence of the defendants prior to July 30, 1955, was barred by the statute of limitations.

Dated, June 16th, 1959.

DOEPKER & HENNESSEY,
/s/ By M. J. DOEPKER,
/s/ JAMES W. INGALLS,
Attorneys for Plaintiff-Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 18, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

In reference to Rule 75-A of Federal Rules of Civil Procedure, the Plaintiff-Appellant hereby designates for inclusion in the Record on Appeal to the United States Circuit Court of Appeals for the 9th Circuit, taken by Notice of Appeal filed December 10, 1958, the following portions of the record proceedings and evidence in this action:

1. Complaint.
2. Motion to Dismiss.
3. Order overruling motion to dismiss.
4. Answer.
5. Motion to limit evidence to those actions and acts of the defendants or any of them which occurred within two (2) years from the institution of suit between the dates of July 30, 1955, and July 30, 1957; and to limit recovery upon such acts and actions of negligence of the defendants within said period, dated November 3, 1958.
6. Order denying motion of November 3, 1958.
7. Defendants' motion for a directed verdict.
8. Instructions to the jury directing the jury to render a verdict for the defendants.
9. Plaintiff's offer of proofs.
10. Judgment.
11. Notice of Appeal.
12. Appeal Bond.

13. Statement of Points on Appeal.
14. This Designation.
15. Transcript of trial.

Dated, June 16, 1959.

DOEPKER & HENNESSEY,
/s/ By M. J. DOEPKER,
/s/ JAMES W. INGALLS,
Attorneys for Plaintiff-Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 18, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

ADDITIONAL DESIGNATION OF RECORD ON APPEAL

Comes now the Defendants-Respondents and pursuant to Rule 75 of the Federal Rules of Civil Procedure again request of the Clerk of the Court that in addition to the matters heretofore designated by the Plaintiff-Appellant designate the following matters to be included upon the record of appeal:

1. Clerk's record of minutes of hearing dated November 10, 1958, including order publishing depositions.

2. Clerk's record of minutes dated November 12, 1958.

3. Depositions of Dr. Bonebrake, Dr. Ellis, Dr. Cordwell and Elsie Summers.

Dated this 22nd day of June, 1959.

HAWKINS & MILLER,
/s/ E. L. MILLER,
A Member of the Firm,
Attorneys for Defendants-Respondents.

Acknowledgment of Service Attached.

[Endorsed]: Filed June 25, 1959. Paul P. O'Brien, Clerk.

No. 16400

United States
Court of Appeals
For the Ninth Circuit

ELSIE SUMMERS,

Plaintiff-Appellant,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE and LEWIS B. HUNTER, a co-partnership, and HUBERT E. BONEBRAKE, M.D., Individually,

Defendants-Respondents.

APPELLANT'S BRIEF

Appeal from the United States District Court of Idaho Northern Division.

JAMES W. INGALLS,
residing at Coeur d'Alene, Idaho
DOEPKER & HENNESSEY,
residing at Butte, Montana
M. J. DOEPKER,
M. F. HENNESSEY,
Attorneys for Appellant.

McKEE PRINTING CO. BUTTE, MONTANA

United States
Court of Appeals
For the Ninth Circuit

ELSIE SUMMERS,

Plaintiff-Appellant,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE and LEWIS B. HUNTER, a co-partnership, and HUBERT E. BONEBRAKE, M.D., Individually,

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residing at Butte, Montana
M. J. DOEPKER,
M. F. HENNESSEY,
Attorneys for Appellant.

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No. 16400

United States
Court of Appeals
For the Ninth Circuit

ELSIE SUMMERS,

Plaintiff-Appellant,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE and LEWIS B. HUNTER, a co-partnership, and HUBERT E. BONEBRAKE, M.D., Individually,

Defendants-Respondents.

APPELLANT'S BRIEF

Appeal from the United States District Court of Idaho Northern Division.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

"Diversity of citizenship: amount in controversy

"a. The District Court shall have jurisdiction in all civil actions where the matter in controversy exceeds the sum or value of $3,000.00, exclusive of interest and costs, and is between

"1. Citizens of different states:

"2. . . .

"3. . . .

"b. . . .

28 USCA 1332.

Paragraph I of the Plaintiff's Complaint (p. 3, Par. I, Tr.) alleges:

> "That plaintiff, Elsie Summers, is a citizen and resident of the State of Montana; that defendants are citizens and residents of the State of Idaho; that the amount involved in this controversy exclusive of interest and costs, exceeds the sum of $3,000.00."

which allegation is admitted in the defendants' Answer, except the residence of Elsie Summers (p. 10, Par. I, Tr.).

Statutory provision allowing appeals 28 U.S.C.A. Sec. 1291.

STATEMENT OF THE CASE

This is a mal-practice case. The Defendants are physicians engaged in the practice of medicine as co-partners. On March 28, 1951, the Defendant, Hubert E. Bonebrake, performed an operation upon the Plaintiff, removing her uterus and appendix and repairing her vagina. In so doing, a curved surgical needle was left within the abdomen of the Plaintiff.

Plaintiff continued to consult the defendant physicians and remained in the care of the said physicians up to and including July 30, 1955. During the period from March 28, 1951, and July 30, 1955, the Plaintiff returned to the Defendants on numerous occasions complaining of severe pain, a soreness, and agony in the area where they had operated upon the Plaintiff, and submitted herself to them for examination, and the said Defendants failed to use the facilities available to them and failed to discover the said surgical needle.

Thereafter on the 5th day of August, 1955, the plaintiff consulted one Dr. R. W. Cordwell at Kellogg, Idaho, who

discovered the existence of the foreign body in the abdomen of the plaintiff.

On or about February 11, 1956, the plaintiff consulted one Dr. MacPherson in Butte, Montana, who advised the removal of the needle and directed her to Dr. Bonebrake for an operation to remove the needle; which operation was performed on February 23, 1956.

The complaint of the plaintiff was filed in the United States District Court of Idaho, Northern Division, on July 29, 1957. To the Complaint, the defendants directed a Motion to dismiss for failure to state a claim upon which relief could be granted and upon the ground that the action as appeared from the face of the Complaint was barred by the Statute of Limitations. The Court denied the said motion. The defendants then answering, alleging as an affirmative defense that the Statute of Limitations for the bringing or maintaining of the said action had run on the 26th day of March, 1953.

Prior to the trial of the said case, defendants moved the Court that evidence during the course of trial and any right of recovery be restricted and limited to those acts which occurred within two years of the institution of said suit, or between July 30, 1955, and July 30, 1957, which motion was overruled without prejudice.

On trial of the said case on November 12, 1958, the Court restricted the evidence of the plaintiff to acts of negligence on the part of the defendants occuring between July 30, 1955, and July 30, 1957. The only evidence of treatment of plaintiff between said dates being the removal of a needle which the plaintiff did not allege or testify was performed in a negligent manner. Upon motion of the defendant, the Court instructed the jury to return a verdict for the defendants.

STATEMENT OF POINTS TO BE ARGUED

Plaintiff-appellant claims that the Court erred:

(1) In granting the defendants' motion to direct the jury to render a verdict for the defendant (p. 162-164, Tr.).

(2) In directing the jury to render a verdict for the defendants as follows:

> "Ladies and gentlemen of the jury, it appears from the evidence in this case that there has been no act of negligence shown against the Wallace Hospital and the Doctors here since July 29, 1955. Under the law people are not allowed to have an action of this kind and let it lay dormant for such a long time. Plaintiff here is complaining about an operation in 1951, and the last treatment, it is admitted, that she received from these Doctors in connection with this first operation was prior to July 29, 1955. The operation where they removed the needle later,—there is no contention on the part of the plaintiff that there was any negligence in that operation. That operation was satisfactory in every way. So there is only one thing that is left open to me and that is to advise the jury to find for the defendants in this case. The Clerk will hand you a verdict. There will be no necessity for you to retire. I will appoint Mr. Rich as foreman of the jury and he may sign the verdict."
>
> P. 164, Tr.

(3) In entering judgment that the plaintiff take nothing by her complaint (p. 16 & 17, Tr.).

(4) In restricting and limiting the evidence of plaintiff to acts or actions of defendants which occurred within two years from the institution of suit, or between the dates of July 30, 1955, and July 30, 1957 (p. 162, Tr.).

(5) In rejecting plaintiff's offer in evidence of plaintiff's Exhibit Number One, which is set out in the Transcript on Pages 155 through 156, as follows:

"Q. There is being shown to you at this time, Mrs. Summers, an object, and the paper that it is attached to has been marked 'Plaintiff's Exhibit 1'. Will you state what that is?

"A. It is a surgical needle.

"Q. You have been testifying about a needle that was handed to you by Doctor Bonebrake?

"A. Yes.

"Q. And is that the needle that was handed to you by him?

"A. Yes.

"Q. As the needle that had been removed from you?

"A. Yes.

"Q. Have you done anything with it except keep it since that time?

"A. I have not.

"Mr. Doepker: We offer it in evidence.

"Mr. Miller: Objected to as incompetent, irrelevant and immaterial. There is no contention in the complaint, or allegation in the complaint, that the needle was wrongfully removed.

"The Court: There is no allegation of any negligence on the part of the Doctor in removing this needle. The objection will be sustained."

(6) In sustaining defendants' objections to testimony relating to acts of negligence of the defendants prior to July 30, 1955, which testimony and the objections and rulings are hereinafter quoted:

"Q. Did something unusual, or did something happen in the year 1951?

"A. Yes.

"Q. Relate briefly to the jury what that was, referring to the early part of the year 1951?

"A. Well, around in 1951 I was menstruating and I seem to wouldn't quit and I just kept on and kept

on, and so I got a very severe backache through this menstruation and so I went to the Doctor in Wallace, Idaho, and—

"Q. All right now, up to that point—before this time who had been your family physician?

"A. Doctor Bonebrake.

"Q. Is that Doctor Hubert E. Bonebrake, one of the defendants here?

"A. That's right.

"Q. And during that period of time, where was he practicing?

"A. Wallace, Idaho.

"Q. And were there other Doctors there at this same Wallace Hospital?

"A. Yes.

"Q. That you had occasion to consult?

"A. Yes.

"Q. Do you remember their names?

"A. Yes.

"Q. Will you tell the Jury what they were?

"A. Doctor Hunter and Doctor Ellis.

"Q. Now, Mrs. Summers, you have related this matter that you have thus far told the Jury, now, you went to who, in connection with this trouble you were having?

"Mr. Miller: To which we object, your Honor, on the ground that it is immaterial, not being within the time period of July 30, 1955, and July 7, 1957.

"The Court: The objection will be sustained.

"Q. Now, then Mrs. Summers, at the time that you were in the—the time that you went to the hospital in 1951, what, if anything was done?

"Mr. Miller: Just a minute, now, your Honor, I renew my objection that this testimony is incompetent and immaterial to any issue in this case. The inclusive dates are July 30, 1955, up until July 30, 1957.

"Mr. Doepker: Your Honor made a ruling on that previously.

"The Court: I made a ruling on that but I made a ruling on the complaint, the complaint was very indefinite. I made the ruling on the complaint, that the statute did not start to run until the date of the last treatment by the defendants here. In other words, that the date of the first operation would not be controlling and that as to her continuous treatment, it would be at the end of her continuous treatment. The Idaho Supreme Court has ruled a little differently in a great many decisions on it. This case depends on this question; When did she receive the last treatment from these Doctors, and until that is established I would have to sustain the objection."

P. 153-154, Tr.

"Q. Now, Mrs. Summers, what was the start of this episode with Doctor Bonebrake, going back to the start that you were treating with him during this period of time?

"Mr. Miller: To which I object, your Honor, as being incompetent, irrelevant and immaterial. There is no showing here that there has been any treatment by Doctor Bonebrake or the other defendants within the two-year period between the filing of the action and July 30, 1955.

"The Court: The objection will be sustained."

P. 159—Tr.

(7) In rejecting plaintiff's offer of proof (p. 163, Tr.).

(8) In granting in affect or in fact the defendants' motion to limit evidence dated November 5, 1958 (p. 13 & 14, Tr.).

(9) In holding the recovery for acts of negligence of the defendants prior to July 30, 1955, was barred by the statute of limitations (p. 164, Tr.).

SUMMARY OF ARGUMENT

The sole issue in this case is as follows:

> When does the statute of limitations begin to run where there is a continuation of treatment by the negligent physicians; at the time of the initial negligent act, upon termination of the patient-physician relationship, upon the discovery of the negligence?

The plaintiff-appellant submits that where the patient-physician relationship continues until discovery of a foreign body within his patient and the patient continues to submit herself to the physician for treatment and examination, complaining of pain and suffering in the area of the operation and the physician fails to discover the existence of the foreign body within the body of the patient, the statute of limitations does not begin to run until the discovery of the foreign body or until the operation is completed by the removal of the foreign body.

Plaintiff-appellant further submits that the best reasoned and fairest rule is that the statute of limitations does not commence to run until the patient has discovered the fact that a foreign substance has been left in his body or through the use of reasonable diligence should have discovered it.

Plaintiff-appellant submits that under the facts of this case under either theory as to when the statute begins to run, the continuing patient-physician relationship theory, or the discovery theory, plaintiff's case is not barred by the Idaho statute of limitations.

ARGUMENT

Under the theory of continuing negligence, the statute of limitations has been held to have been tolled as long as the patient-physician relationship continues:

> "Ordinarily a case of action for mal-practice occurs at the time of the negligent act or omission and the limitation runs from that date. In case of continued negligent treatment, however, limitations may run from the date of the last treatment rather than from the original act of mal-practice."
>
> 54 CJS, Section 174, page 142.
>
> "The mere fact that treatment continues after the original act does not toll the Statute of Limitations, but where the injurious consequences arise from a course of treatment, limits do not begin to run until treatment is terminated unless the patient discovered or should have discovered the injury before that time, the mal-practice being regarded as a continuing tort and the fact that a substantial portion of the injury resulted before completion of the treatment will not permit interposition of the bar of the statute as to such injury."
>
> 54 CJS, Section 174, page 143.
>
> "Where the surgeon continues treating the patient following the operation, the failure to remove the foreign subject during the period of subsequent treatment has been regarded as continuing negligence, that the actions accrue only at the conclusion of the treatment and suit may be brought at any time within the limitation period following the termination of treatment, even though the original act of negligence would have been barred."
>
> 54 CJS, Section 174, page 144.

A discussion regarding leaving a sponge in the abdominal cavity appears on Page 897, 37 CJ, Section 259:

> "Where a physician and surgeon operates upon a patient for what he pronounces to be appendicitis and

neglects or carelessly forgets to remove from the abdominal cavity a sponge which he had placed therein, and this condition continues during his entire professional relation to the case and is present when he abandons or otherwise retires therefrom, the statute of limitations does not begin to run against a right to sue and recover on account of such want of skill, care, and attention, until the case has been so abandoned or the professional relation otherwise terminated."

Sly v. Van Lenger, 120 Misc. 420, 198 NYS 608;

Gillette v. Tucker, 67 Oh. St. 106, 127, 133, 65 N E 865.

This theory has been adopted by the law of the State of Idaho by this Honorable Court:

Moore v. Tremelling 100 Fed. 2d 39.

The negligence of the physician in failing to remove a foreign object left in the patient is continuing and the limitation period does not commence to run until the termination of the treatment.

Silvertooth v. Shallenberger, 49 Ga. App. 133, 174 SE 365;

Hahn v. Claybrook, 100 Atl. 83, L.R.A. 1917C 1169;

DeHahn v. Winter, 258 Mich. 293, 241 N.W. 923;

Schmit v. Esser, 183 Minn. 354, 236 N.W. 622;

Williams v. Elias, 140 Neb. 656, 1 N.W. 2d 121;

Bowers v. Santee, 99 Ohio State 361, 124 N.E. 238;

Hotelling v. Walther, 130 P. 2d 944;

Peteler v. Robison, 81 Utah 535, 17 P. 2d 244.

"The foregoing authorities, in our opinion, announce a just and most equitable rule, and we are disposed to follow them. The case now before us is much stronger than either of the cases from the New York

and Ohio courts. In each of those cases, the negligent act consisted in not removing the sponge from the body of the patient at the time of the operation. It might be well said that the negligence involved in those cases occurred in the performance of the operation. In the present case the operation, up to the closing of the wound and the leaving of the drainage tube therein, was entirely proper. The negligence occurred thereafter, by reason of the surgeon neglecting to remove the tube left in the patient's wound after it had served its purpose. This negligence continued during the entire time the tube was left in the body of the patient, and only ended upon the removal of said tube. With much greater reason than that which prompted the Ohio and New York courts to hold as they are shown to have done, cannot this court now hold that the surgeon's negligence continued up to the removal of said tube, and that the appellants' cause of action then accrued and would not be barred until one year thereafter? Such is the holding of this court which necessitates the overruling of the case of Gum v. Allen, supra.

"There is another principle supported by eminent authority upon which it might be held that appellants' cause of action is not barred, and that is, that an operation like that performed upon Mrs. Hysman is not complete until the wound has been closed and all appliances used in the operation have been removed."

Hysman v. Kirsch, 57 P. 2d at page 908.

"When does the treatment cease? So long as the relation of physician and patient continues as to the particular injury or malady which he is employed to cure and the physician continues to attend and examine the patient in relation thereto and there is something more to be done by the physician in order to effect a cure, it cannot be said that the treatment has ceased."

Schmit v. Esser, 183 Minn. 354, 236 NW 622.

This would appear to be a reasonable rule because so long as the patient is under the care of the physician and

the physician in the exercise of ordinary care should have discovered the condition that is causing damage to the patient, the patient should not be held to the duty of starting a suit against the doctor. Adoption of a contrary rule would penalize the patient for his confidence in the doctor and reward the physician for failure to discover what he should have discovered or for his non-disclosure of facts which he only had the knowledge to possess. In the case at bar the plaintiff, Mrs. Summers, continued in the care of the defendant doctors at all times until the needle was removed. The operation which they performed upon her was not complete until the removal of the needle. When the patient learned of the cause of her continued illness she returned to the defendant physicians so that they could complete the operation by removing the needle.

In some jurisdictions regardless of the continuation of the patient-physician relationship, the courts have held that the statute of limitations does not begin to run until the patient knows or in the exercise of reasonable diligence should have known of the injury and the cause of disability.

> "In some jurisdiction an exception to the general rule founded on the ignorance of the patient of the disability is recognized so that limitations do not run until the patient knows or with the exercise of reasonable diligence should know of the injury or cause of the disability."
>
> 54 CJS Section 174, page 143.

> "In any event, it has been held that the limitations run from the date on which the patient became chargeable with notice of the fact of mal-practice."
>
> 54 CJS, Section 174, page 143.

"If a foreign substance is negligently left in the human body by a defendant, the statute of limitations does not commence to run until the plaintiff has discovered the fact that a foreign substance has been left in his body or through the use of reasonable diligence should have discovered."

Pellette v. Sonotone Corp., 55 CA 158 130 Pac. 2d 181;

Ehlen v. Burrows, 51 CA 2d 141, 124 Pac. 2d 82;

Bowers v. Olch (Cal. 1953) 260 Pac. 2d 997;

Agnew v. Larson (Cal. 1947) 185 Pac. 2d 851;

Costa v. Regents of the University of California (Cal.) 254 Pac. (2d) 85;

Winkler v. So. Cal. Perm. Med. Grp. (Cal. 1956) 297 Pac. 2d 728.

The rule announced by these jurisdictions would seem to be the most reasonable, fair, and just. We cannot conceive why a person should be charged with the duty of bringing action when he does not know that he has a cause of action and would not know that he sustained an injury for which he was entitled to redress.

This rule would seem to be more just than the rule requiring the continuation of the physician-patient relationship as it recognizes that the injury may progress after the abandonment of treatment or may only be discovered after continued and lengthy consultations with other surgeons. Under the other rule one might be denied redress because of a negligent examination or diagnosis of another physician or because of the other physicians loyalty to his brethren of the profession.

Counsel respectfully submits that under either of the modern rules or exceptions preventing the running of the statute when the original negligence occurs, the court er-

red in its ruling regarding the statutes of limitations and upon its instructions to the Jury.

Counsel urges, however, that the best and most just rule in such cases as at bar, is that the statute be tolled until discovery or until the plaintiff should have in the exercise of ordinary diligence discovered the injury or cause of injury as any other rule would encourage and reward the careless, unconscionable, and unscrupulous.

Respectfully submitted,

JAMES W. INGALLS,
Residing at Coeur d'Alene, Idaho
DOEPKER & HENNESSEY,
M. J. DOEPKER,
M. F. HENNESSEY,
Butte, Montana,
Attorneys for Appellant.

Service of the above and foregoing Brief of Appellant is hereby admitted and copy is received this.....
.....day of September, 1959.

HAWKINS & MILLER,
By .....
Attorneys for Defendants and Appellees.

No. 16400

United States
Court of Appeals
FOR THE NINTH CIRCUIT

ELSIE SUMMERS,

Plaintiff - Appellant,

vs.

WALLACE HOSPITAL, PAUL L. ELLIS, HUBERT E. BONEBRAKE and LEWIS B. HUNTER, a co-partnership, and HUBERT E. BONEBRAKE, M. D., Individually,

Defendants - Respondents.

APPELLEES' BRIEF

Appeal from the United States District Court of Idaho
Northern Division

E. L. MILLER

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Coeur d'Alene, Idaho
Attorneys for Appellees

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Defendants - Respondents.

APPELLEES' BRIEF

Appeal from the United States District Court of Idaho Northern Division

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STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The appellees accept the appellant's statement of jurisdiction.

STATEMENT OF THE CASE

On March 26, 1951, the plaintiff had performed

upon her by the defendants, a total hysterectomy. (Tr. pg. 30, Pl. Ex. D-2, D-2A, D-2-I, Dep. of Def. Bonebrake, pg. 47 Tr.)

On November 29, 1954, plaintiff consulted defendants for the last time. (Tr.pg. 123, 157, 158, 161. Pl. Ex. D-23, Dep. Def. Bonebrake, pg. 21.)

On August 5, 1955, Dr. Cordwell, then the plaintiff's doctor, discovered the presence of a needle in the abdominal wall.

Plaintiff filed her complaint on July 29, 1957.

Thereafter defendants filed motion to dismiss (Tr. pg. 8) which was denied without prejudice and thereafter filed their answer together with a motion to restrict evidence, which was likewise denied without prejudice. (Tr. pg. 15).

On November 10, 1958, pursuant to the Court's order, all depositions were duly published.

On November 12, 1958, the Court directed entry of a verdict during course of Plaintiff's case, for the defendant, upon the grounds that the action was barred by the statute of limitations. (Tr. pgs. 15, 16, 17.)

STATEMENT OF POINTS TO BE ARGUED

The entire issue before the court is whether this action brought by the plaintiff may be maintained in view of the provisions of 5-219 Idaho Code, and

the decision of the highest court of the State of Idaho, in TRIMMING vs. HOWARD, 52 Idaho 412, 16 P. 2d 661.

SUMMARY OF ARGUMENT

The appellant proposes upon appeal for determination by this court, the issue as to the commencement of the running of the statute of limitations in a malpractice action. The appellant points out the three rules:

1. The original injury rule.

2. Upon cessation of physician-patient relationship rule.

3. Discovery rule.

The appellant relies upon the discovery rule. (Tr. pg. 165)

The provisions of 5-219 Idaho Code, sub. para. 4, recite as follows:

> "5-219. Actions against Officers, for penalities, on bonds, and for personal injuries. — Within two years: . . .
> 4. An action to recover damages for an injury to the person, or for the death of one caused by the wrongful act or neglect of another."

As further grounds upon appeal, appellant raises for consideration of the court the act of the trial court in restricting evidence to that two year period

of time immediately preceding the filing of the complaint.

It is the position of the appellees that under and by virtue of the decisions of the highest court of the State of Idaho, the statute of limitiations commenced to run on or at the time of the original injury, being March, 1951, and that the running thereof was tolled for only so long as the appellant continued under the treatment of appellees. Upon cessation of treatment the statute of limitations commenced to run.

ARGUMENT

In March 1951, there was performed upon the plaintiff a hysterectomy operation. From 1951 through 1954, the plaintiff solicited treatment from the defendants.

On November 29, 1954, the plaintiff ceased any further treatment from the defendants.

In August, 1955, the presence of a needle in the plaintiff's abdominal wall was discovered. In February, 1956, the plaintiff requested the defendants, and in particular Dr. Bonebrake, to remove the needle. The plaintiff made no allegation or complaint that there was any negligence in the operation or procedure by which the needle was removed.

It is the position of the appellees that the statute of limitations commenced to run at the time the needle was left within the person of the plaintiff, and was

tolled only for so long as the defendant continued to treat the plaintiff. Upon cessation of treatment of the plaintiff by the defendants, in November, 1954, the statute of limitations commenced to run. The action had to be instituted within two years from that date, or on and before November 29, 1956. The action was not filed nor instituted until July 29, 1957, and was therefore barred by the statute of limitations.

The Supreme Court of the State of Idaho, in an identical case of TRIMMING vs. HOWARD, 52 Idaho 412, 16 P. 2d 661, enunciated the rule as concerns the statute of limitations in a malpractice suit. The Court stated as follows:

> "The gist of a malpractice action is negligence, not a breach of contract of employment. The original injury, be it caused by carelessness, negligence, misconduct or whatnot, remains the sole cause of action; and the action is one of tort and not for breach of contract.
>
> "According to his pleadings, appellant's cause of action arose on July 4, 1926, when the broken needle was left in his back."

The courts of Idaho have therefore adopted the original injury theory as determining the question of limitation of action insofar as malpractice cases are concerned.

In the Case of MOORE vs. TREMELLING, 100 F. 2d 39 (C. A. 9), this court had occasion to examine the law of Idaho in a malpractice action. The court there held as follows:

"Section 5-219, Idaho Code Annotated 1932, provides that actions to recover damages for personal injury caused by wrongful act or neglect of another must be brought within two years. The accident occurred on May 28, 1931, and appellee first consulted appellant on that day for treatment. The complaint was filed December 5, 1933. The contention of appellant is that there is no evidence that appellee was treated by him after August 20, 1931, and consequently that the cause of action accrued at that time; that even if appellant did advise or treat appellee as claimed by him on January 28, 1932, there is no evidence that appellee was injured by such advice or treatment. There is no merit in his contention. There is evidence that on January 28, 1932, appellant advised appellee to throw away his crutches and put weight on his leg and that appellee was damaged by following this advice."

The MOORE case proposes that continuing treatment will toll the running of the statute of limitations and the court in that case found that the injury had actually occurred within two years of the filing of the complaint.

In the instant action, six years and four months had elapsed since the original injury. Two years and eight months had elapsed from the cessation of treatment date until the complaint was filed. The only basis upon which the appellant could maintain the action is as stated in the discovery rule which was examined by the Supreme Court of the State of Idaho in the TRIMMING case and rejected.

As stated by the appellant upon her direct ex-

amination, at no time after 1954 was she treated by the appellees.

"Q. Well, now, go back and give to the jury your best memory of the times that you consulted with Doctor Bonebrake during this period of time about the subject you are testifying about?

"A. Do you mean after my operation?

"Q. Now, you have to come from the time you testified that the needle was removed back to the operation. (10) Give us the times that you saw him about it.

"A. Well, in 1954, I was in constant care with him. In '53 I was in constant care with him and in '52 I was in constant care with him, always going back once and twice a month. (Tr. pg. 157)

"Q. Mrs. Summers, in order to fix the definite time, now, between 1956 and between August 5, 1955 back toward '51 when did you last see Doctor Bonebrake about this trouble in your abdomen?

Mr. Miller: Your Honor, I am going to object to that as impeaching his own witness. She has already testified that November, 1954 was when she was treated by Doctor Bonebrake. (15)

The Court: Well, maybe her testimony will be the same. She may answer.

"A. As I said, I was in contact with Doctor Bonebrake through 1954, '53, '52." (Tr. pg. 161)

RESTRICTION OF EVIDENCE

The appellant assigns as error the action of the trial court in restricting the evidence to the two years immediately preceeding filing of complaint.

The action of the trial court was proper. In TESSIER vs. U. S., 156 F. Supp. 32, affirmed 269 F. 2nd 305 (CA 1st), the Court had before it a like statute of limitations as Idaho. Metal was left in the patient after an operation. The lower court held that no recovery could be had for any act which extended beyond the two years preceeding the filing of the complaint.

In affirming the lower court, the Court of Appeals held:

> "It seems clear that the law of that state gave him a right of action as soon as the metal fragments were abandoned in him. There was a legal wrong on June 7, 1947, and suit thereon was not suspended because of any duty imposed on the United States to remove the fragments."
> TESSIER vs. UNITED STATES
> 269 F. 2d 305 (C.A.1st)

The appellant relies upon the case of SILVERTOOTH vs. SHALENBERGER, 174 S. E. 365. That case held that the plaintiff could only recover for acts of negligence, if any, which occurred within the period of limitation as provided by state law from the date of filing of the complaint. The ruling was re-affirmed in SILVERTOOTH vs. SHALENBERGER, 196 S. E. 829.

The trial court's ruling was proper and in accordance with the authorities.

REMOVAL OF NEEDLE

The appellant, by her complaint, made no allegation as to any acts of negligence in the procedures by which the needle was removed. (Tr. p. 164) The only act of the appellees therefore within the two years prior to the filing of the complaint was not a negligent act, but one for which there could be no recovery under the pleadings or in fact.

CONCLUSION

The matter before the court is a legal question not a social problem. The statute of limitations may be a cruel rule, but is designed to apply to all alike to prevent the litigation of stale claims.

The highest court of the State of Idaho, upon a case of almost identical nature, has established the law of the State of Idaho. It carefully examined the discovery rule as exists in the State of California, and rejected the same.

Under the doctrine of ERIE RAILROAD vs. TOMPKINS, 304 U. S. 64, 82 L. Ed. 1188, it is the duty of Federal Courts to apply the substantive law of the state in matters before it.

It is therefore respectfully submitted that the directed verdict was proper and that the action was

barred by the statute of limitations of the State of Idaho.

Respectfully submitted,

E. L. Miller

.....

A Member of the Firm of
HAWKINS & MILLER
Coeur d'Alene, Idaho
Attorneys for Appellees

Service of the above and foregoing Brief of Ap pellees is hereby admitted and copy is received this .....day of October, 1959.

HAWKINS & MILLER,

By .....
Attorneys for Appellees

No. 16400

United States
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ELSIE SUMMERS,
Plaintiff-Appellant,

Plaintiff-Appellant,

vs.

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Defendants-Respondents.

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Appeal from the United States District Court of Idaho
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JAMES W. INGALLS,
residing at Coeur d'Alene, Idaho

DOEPKER & HENNESSEY,
residing at Butte, Montana

For Appellant

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Defendants-Respndents.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court of Idaho
Northern Division

SUMMARY OF REPLY

The appellee argues that the decision of the Supreme Court of the State of Idaho must be applied and that therefore the Statute of Limitations begins to run at the time of the original injury.

It is the position of the appellant that this Court is not bound by the decision of the State Court except as to the precise question presented in that Court and that plain-

tiff here is entitled to recover upon either the rule of continuing treatment or the discovery rule which rules were not applied by the Trial Court.

ARGUMENT

The case of Trimming vs. Howard, 52 Ida 412, 16 Pac 2d 661, was an action against the physician for an injury upon his patient based upon breach of contract and fraudulent representation. The question presented was whether the action was governed on the Statute of Limitations upon personal injury, breach of contract or fraudulent representation. The Idaho Court found that the action was based upon personal injury. The Trimming case is only a precedent for the principle that an action in malpractice is governed by the Statute of Limitations on tort.

The case does not disclose when the injury was *discovered* or whether or not the plaintiff has been under the continuing care of the physician.

Apparently the theories propounded in this matter were not before the Idaho Court as they were not discussed by it.

The decision of the Idaho Court relies strongly upon the case of Gum vs. Allen, 119 C.A. 293, 6 Pac 2d 311, which was expressly overruled by the California Court in Huysman vs. Kirsch, 57 Pac 2d 908, at page 912. The Idaho Court therefore, adopted the prevailing rule at the time of the decision. The Idaho Court has not had an opportunity to change the rule and to adopt the modern rule as no case upon the precise point involved here has been presented to it for decision.

This Court in Moore vs. Tremelling, 100 Fed 2d 39, (C.A. 9) did not feel compelled to follow the decision of the Idaho Court in Trimming vs. Howard, supra:

> "A decision of the State Court must be on the precise point in controversy in the Federal Court to have biding effect as a precedent therein."
>
> 35 C.J.S., Sec 176, p 1260

The opinion of a State Court of last resort, construing a state statute, is conclusive on the Federal Courts only to the extent of the precise question decided.

> "The learned Judge, however, deemed himself precluded from the right to exercise an independent judgment as to the meaning of the Statute, because he was under obligation to follow the interpretation of the Statute by the Supreme Court of Tennessee in the case of Railroad vs. Dies, 98 Tenn 655 41 S.W. 860 and accordingly instructed the jury that the running of an engine backward was a violation of the Statute.
>
> "Neither the case of Railroad vs. Dies, nor any other Tennessee case, has ever involved the precise question presented by the instruction, denied or required the Tennessee court to decide that the Statute was violated whenever an engine was run backward without regard to the circumstances.
>
> "We recognize the duty of following the construction placed upon the State Statute by the highest Court of the state.
>
> "But no such broad question was involved, and the actual decision was put upon the ground that the company had, by running its engine backwards at night, without a headlight, disabled itself from complying with that part of the statute requiring an effective lookout ahead. The opinion as a construction of the Statute is authoritative to the extent of the precise question

decided and no farther. *Nothing more was necessary to the determination of the rights of the parties to that controversy.*"

(emphasis supplied)

Southern Railway Co. vs. Simpson
131 Fed Reporter 705

"Even if the Court was dealing in these cases with demands rejected by an employer or the industrial commission before the new acts became effective, the cases are not determinative of the issue at bar, because they are only authoritative to the extent of the precise question decided and no further."

Philadelphia National Bank vs. Raff
76 Fed 2d 843

"Even if we were bound by the Virginia decisions in a case of this character, we would follow our own decisions as laying down the applicable law, in the absence of a Virginia decision deciding the exact question to the contrary."

Bodenheimer vs. Confederate Memorial Association

68 Fed 2d 507

"It is the duty of the Federal Courts in suits brought in or removed to the District Courts to decide for themselves all relevant questions of state law, and while they will follow the decisions of State Courts as to interpretation of a state statute, we do not think that the case of Gilseth vs. Risty so clearly or decisively passed upon the question here involved as to control our decisions."

Risty vs. Chicago R.I. & P. Railroad Co.

70 Law Ed 650

Where the precise question has not been presented to the highest State Court for decision, the Federal Courts will adapt their own interpretation of the law following the rule that appeals best to its sense of justice and right:

Hagen & Cushing Co. vs. Washington Water Power Co.

99 Fed 2d 614

Cooney vs. Cooper, 143 Fed 2d 312

"The question presented by the motion is interesting. It is novel also, because the high courts of California have not been called upon to determine it. So, if there were a conflict between decisions elsewhere, we might, even in the absence of Erie R. Co. vs. Tompkins, choose to follow one group of decisions rather than the other, — following the one that appeals more to our sense of justice and right."

Katakoa vs. May Department Stores

28 Fed Supp 3 at page 5

"Where the law has not been settled in the State Courts, it is the right and duty of the Federal Court to exercise their own judgment and they properly claim the right to adopt their own interpretation of the law applicable to the particular case."

Burgess vs. Seligman, 107 U.S. 541

27 Law Ed 359 at 365

RESTRICTION OF EVIDENCE

It is apparent that the Court in Tessier vs. U.S., 156 Fed Supp 32, was applying the original injury theory.

Under the original injury theory each repeated act of negligence would give rise to a new cause of action and all acts of negligence which occurred prior to the two year period would not be compensable.

The cases cited by appellants in their original brief refer to continuing negligence or a tolling of the Statute; if these Courts restricted the evidence and recovery to acts of negligence occurring within the Statute of Limitations, there would be no need to apply the continuing negligence theory or to hold that the treatment was not complete until the removal of the foreign object, and it could not be said that the Statute was tolled until discovery or the treatment terminated.

CONCLUSION

The Supreme Court of the State of Idaho has not acted upon the precise question before the Court in this case. It did not examine the discovery rule or continuing negligence rule and reject them, but chose to follow the rule as it then existed in California as pronounced by Gum vs. Allen, supra, now overruled.

There being no decision of the Supreme Court of Idaho upon the precise question here presented, the Court may adopt the rule best founded upon justice and right.

Justice will not bar a cause of action until the injured party has had an opportunity to discover the wrong.

Respectfully submitted, this 30th day of October, 1959.

James W. Ingalls

JAMES W. INGALLS
Coeur d'Alene, Idaho

DOEPKER & HENNESSEY

By M. J. Doepker

412 Medical Arts Building
Butte, Montana

Attorneys for Plaintiff-Appellant

Service of the above and foregoing Reply Brief of Appellant is hereby admitted and copy is received this..... day of....., 1959.

HAWKINS & MILLER

By.....
Attorneys for Defendants and Appellees

Nos. 16383, 16401

United States
Court of Appeals
for the Ninth Circuit

MORRISON-KNUDSEN COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 341, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Transcript of Record

Petitions For Review and Petitions to Enforce Order of the National Labor Relations Board

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—6-30-59

Nos. 16383, 16401

United States
Court of Appeals
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MORRISON-KNUDSEN COMPANY, INC.,
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Petitions For Review and Petitions to Enforce Order of the National Labor Relations Board

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

ALLEN, DeGARMO & LEEDY,
SETH W. MORRISON,
1308 Northern Life Tower,
Seattle, Washington,

For Petitioner, Morrison-Knudson, Co., Inc.

HARTLIEB & GROH,
GORDON W. HARTLIEB,
Box 2068,
Anchorage, Alaska,

For Petitioner, International Hod Carriers, Building and Common Laborers Union.

THOMAS J. McDERMOTT,
Associate General Counsel,
National Labor Relations Board,
Washington 25, D. C.,

For Respondent, National Labor Relations Board.

GENERAL COUNSEL'S EXHIBIT No. 1-A

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Case No. 19-CB-450. Date Filed: 10/9/56. Compliance Status Checked By: nm.

1. Labor organization or its agents against which charge is brought:

Name: Construction and General Laborers Union Local 341.

Address: Anchorage, Alaska.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section (8b) Subsection(s) (2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge: In that the above named labor organization through its officers and agents, by an illegal arrangement, have caused the Morrison-Knutsen Company at its White Alice Job Site Two to refuse to hire the undersigned and Chester Wilson of Iliamna, Alaska, Henry Olympic, Simeon Zacker and William Rickteroff of Kokhanok Bay, Alaska, and various other men from local communities on or about the first of June, 1956, because we

General Counsel's Exhibit No. 1-A—(Continued) were not members of the above named Union and in violation of Sections 8 (b) (2) of the Labor Management Relations Act of 1947.

3. Name of Employer: Morrison-Knutsen Company.

4. Location of Plant Involved: White Alice Job Site Two, Iliamna, Alaska.

5. Type of Establishment: Construction.

6. Identify Principal Product or Service: Defense Construction.

7. No. of Workers Employed: About 150-200.

8. Full Name of Party Filing Charge: Denton Rickey Moore.

9. Address of Party Filing Charge: Kokhanok Bay, Alaska.

10. Tel. No. .....

11. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

October 2, 1956.

/s/ By DENTON R. MOORE,
Individual.

Admitted in Evidence September 9, 1957.

GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No. 19-CA-1405. Date Filed: 10/9/56. Compliance Status Checked By: nm.

1. Employer Against Whom Charge Is Brought:

Name of Employer: Morrison-Knutsen Company.

Number of Workers Employed: Approx. 150-200.

Address of Establishment: White Alice Job Site Two, Iliamna, Alaska.

Type of Establishment: Construction camp.

Identify principal product or service: Defense Construction.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge: In that the company through its officers and agents on or about March 15 promised the undersigned and Henry Olympic, Simeon Zacker, Freddie Olympic and others from Kokhanok Bay and Iliamna (and various other local communities) jobs at the White Alice job site two and on or about June first refused to hire us because we were not members of Construction and General Laborers Union Local 341 in keeping with an illegal

General Counsel's Exhibit No. 1-C—(Continued)

arrangement with said labor organization all in violation of Sections 8 (a) (1) & (3) of the Labor Management Relations Act of 1947.

3. Full Name of Party Filing Charge: Denton Rickey Moore.

4. Address: Kokhanok Bay, Alaska.

* * * * *

7. Declaration:

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

October 2, 1956.

/s/ By DENTON R. MOORE,
Individual.

Admitted in Evidence September 9, 1957.

GENERAL COUNSEL'S EXHIBIT No. 1-E

United States of America
Before The National Labor Relations Board
Nineteenth Region

Case No. 19-CA-1405

MORRISON-KNUDSEN COMPANY, INC. and DENTON R. MOORE, An Individual.

Case No. 19-CB-450

INTERNATIONAL HOD CARRIERS, BUILDING, AND COMMON LABORERS UNION OF AMERICA, LOCAL 341, AFL-CIO and DENTON R. MOORE, An Individual.

CONSOLIDATED COMPLAINT

It having been charged by Denton R. Moore, an individual, that Morrison-Knudsen Company, Inc., Boise, Idaho and Anchorage, Alaska, and that International Hod Carriers, Building, and Common Laborers Union of America, Local 341, AFL-CIO, Anchorage, Alaska, have engaged in and are now engaging in certain unfair labor practices affecting commerce as set forth in the Labor Management Relations Act, 1947, 61 Stat. 136 (herein called the Act), the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Nineteenth Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, and Section 102.33,

General Counsel's Exhibit No. 1-E—(Continued) hereby issues this Consolidated Complaint and alleges as follows:

I.

Morrison-Knudsen Company, Inc., a Respondent herein referred to as M-K, is a corporation licensed to engage in business in the State of Idaho, and in the Territory of Alaska, having its principal office in Boise, Idaho and project offices in Anchorage, Alaska. It is engaged in the engineering of and in the performance of construction work in a number of states in the United States, and in the Territory of Alaska, for which services it annually derives an income in excess of $10,000,000. One of the projects in which it is presently engaged in Alaska is that of constructing defense facilities for and pursuant to a direct contract with the United States Government, for which it is receiving annual compensation in excess of $1,000,000.

Respondent M-K is an employer within the meaning of Section 2 (2), whose operations affect commerce within the meaning of Section 2 (6) and (7) of the Act.

II.

International Hod Carriers, Building, and Common Laborers Union of America, Local 341, AFL-CIO, a Respondent herein referred to as Local 341, is a labor organization formed among employees who are normally employed as laborers in the construction industry and in other related industries in Alaska, which is affiliated with International Hod Carriers, Building, and Common Laborers of Amer-

General Counsel's Exhibit No. 1-E—(Continued)

ica, and has its principal offices in Anchorage, Alaska.

Respondent Local 341, by virtue of its function as representative of employees with respect to their wages, hours, and working conditions, is a labor organization within the meaning of Section 2 (5) of the Act.

III.

Denton R. Moore, an individual who lived near Lake Iliamna in Alaska, who at all times material was not a member of Respondent Local 341, filed charges herein against Respondent M-K and Respondent Local 341 on October 9, 1956.

IV.

Respondent M-K and Respondent Local 341, during the six-month period prior to filing the charges herein, and at all times thereafter in the 1956 construction season in Alaska, had an unwritten agreement, arrangement or practice which governed them, whereby applicants for jobs as construction laborers were cleared by Local 341 as a condition of hire.

V.

The agreement, arrangement or practice referred to in paragraph IV was operative at times when the officials and agents of Respondent Local 341 were obligated to procure employment for members of said labor organization in preference to nonmembers.

VI.

While being parties to the agreement, arrange-

General Counsel's Exhibit No. 1-E—(Continued)

ment or practice under the circumstances referred to in paragraphs IV and V, during the construction season of 1956 and within the six-month period prior to filing of charges herein, Respondent M-K used the facilities and dispatching personnel of Respondent Local 341 to determine the qualifications of applicants seeking hire as construction laborers.

VII.

Respondent M-K, during the course of its dealing with Respondent Local 341 described in paragraphs IV, V, and VI inclusive, additionally gave effect to a written agreement between them which empowered Respondent Local 341 to discipline its members in the employ of Respondent M-K without limitation on its right so to do.

VIII.

Under the circumstances described in paragraphs IV, V, and VI, Respondent Local 341 functioned as the hiring agent of Respondent M-K, and during said period on or about June 11, 1956, membership in Local 341 was required as a condition of hire and dispatch in behalf of Respondent M-K from Anchorage to its job sites, of the following applicants:

Maris Abolins	Ronald S. Crowe
Robert Bleek	Joel I. Garnes
Ralph Chapman	Harry Vance
Joseph E. Churchill	William A. Wyman

IX.

Under the circumstances described in paragraphs

General Counsel's Exhibit No. 1-E—(Continued) IV, V, VI, and VIII, Respondent M-K refused to treat as eligible for employment as construction laborers at its Big Mountain construction site near Lake Iliamna, any local applicants at Big Mountain until such time as Respondent Local 341 had given preference to its members and to others then accepted as members, who desired dispatch for such employment, and thereby deferred until mid-August the employment (except for casual employment as cargo handlers) of the following local applicants:

Denton R. Moore	Frank Rickteroff
Elia Anelon	Michael Rickteroff
Sava Anelon	William Rickteroff
Nicheenty Anelon	Fred Roehl
Gabriel Gust	Henry Trefon
Gillie Jacho	Vas Trefon
George Jacho	Jack Vantrease
Mike Jensen	Chester Wilson
Alec Kolyaha	Paul Wassillie
Asseny Melognok	Maxim Wassillie
Fred Olympic	Ole Wassenkari
Henry Olympic	Simeon Zacker
David Rickteroff	Earnest Zink

X.

By its agreement, arrangement or practice and its course of action described above, Respondent M-K, individually and through Local 341 as its hiring agent, has discriminated in the hire of employees and with respect to applicants for employment, to encourage membership in a labor organization, in

General Counsel's Exhibit No. 1-E—(Continued)

violation of Section 8 (a)(3), and thereby has been and is interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 in violation of Section 8 (a)(1) of the Act.

XI.

By its agreement, arrangement or practice and its course of action described above, Respondent Local 341 has caused Respondent M-K to discriminate against employees and applicants for employment in a manner proscribed by Section 8 (a)(3) of the Act in violation of Section 8 (b)(2) of the Act, and thereby has been and is restraining and coercing employees in the exercise of rights guaranteed in Section 7 in violation of Section 8 (b)(1)(A) of the Act.

XII.

Under the circumstances described in paragraphs IV through XI above, the individuals named in paragraphs VIII and IX who secured employment with Respondent M-K, during the period of their employment paid initiation fees and dues to Respondent Local 341 in the amounts required for attaining and continuing membership therein.

XIII.

The acts and conduct of Respondent M-K and of Respondent Local 341, as set forth above, are unfair labor practices that have occurred and are occurring in connection with the operations of the Respondent M-K in Alaska as described in paragraph

General Counsel's Exhibit No. 1-E—(Continued)

I, and have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states of the United States and within a Territory of the United States, and between said Territory and the several states of the United States, and have led to and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce, within the meaning of Sections 2 (6) and (7), 8 (a)(1) and (3), and 8 (b)(1)(A) and (2) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Acting Regional Director of the Nineteenth Region, issues this Consolidated Complaint against the above named Respondents, on this 2nd day of August, 1957.

[Seal] /s/ PATRICK H. WALKER,
Acting Regional Director National Labor Relations Board, Region 19, 407 U. S. Court House, Seattle 4, Wash.

[Title of Board and Causes.]

ORDER CONSOLIDATING CASES AND NOTICE OF HEARING

Charges, pursuant to Section 8 (a) and (b) of the Labor Management Relations Act, 1947, as amended, 61 Stat. 136, having been filed in the above numbered cases, copies of which charges are attached hereto, and the undersigned having duly considered

General Counsel's Exhibit No. 1-E—(Continued)

the matter and deeming it necessary in order to effectuate the purposes of the Act and to avoid unnecessary costs or delay,

It Is Hereby Ordered, pursuant to Section 102.33 of the National Labor Relations Board Rules and Regulations, Series 6, as amended, that these cases be and they hereby are consolidated.

Please Take Notice that on the 19th day of August, 1957, at 10:00 A.M., in Room 407, U. S. Court House Building, Fifth and Spring, Seattle, Washington, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Consolidated Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You Are Further Notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Acting Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the Consolidated Complaint within ten days from the service thereof, and that unless you do so all of the allegations in the Consolidated Complaint shall be deemed to be true and may be so found by the Board.

In Witness Whereof the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Order Consolidating Cases and Notice of Hearing to be signed by the Acting

General Counsel's Exhibit No. 1-E—(Continued)
Regional Director for the Nineteenth Region of the National Labor Relations Board on this 2nd day of August, 1957.

[Seal] /s/ PATRICK H. WALKER,
Acting Regional Director, National Labor Relations Board, 19th Region.

Admitted in Evidence September 9, 1957.

GENERAL COUNSEL'S EXHIBIT No. 1-H

[Title of Board and Causes.]

ANSWER

Respondent Union answers the Complaint on file herein as follows:

I.

Admits the allegations contained in paragraphs Numbered II and III of the Complaint.

II.

Alleges that it is without knowledge or information sufficient to form a belief as to the allegations contained in paragraph VII and therefore denies the same except to admit that there was a written agreement between respondents herein.

III.

Alleges that it is without knowledge or information sufficient to form a belief as to the allegations contained in paragraphs I and IX of the Complaint.

General Counsel's Exhibit No. 1-H—(Continued)

IV.

Denies the allegations contained in paragraphs IV, V, VI, VIII, X, XI, XII, XIII of the Complaint.

V.

Denies each and every allegation not herein specifically admitted and puts the General Counsel of the National Labor Relations Board to a strict proof thereof.

Wherefore respondent Union prays that the General Counsel take nothing by its Complaint and that the same be dismissed.

/s/ J. M. CLARK,
President, International Hod Carriers, Building, and Common Laborers Union of America, Local 341, AFL-CIO.

HARTLIEB, GROH & RADER,
/s/ By GORDON W. HARTLIEB,
Attorneys for Local 341.

Admitted in Evidence September 9, 1957.

GENERAL COUNSEL'S EXHIBIT No. 1-I

[Title of Board and Causes.]

AMENDED ANSWER

Respondent Union files this its amended Answer to the Complaint on file herein and alleges as follows:

General Counsel's Exhibit No. 1-I—(Continued)

First Defense

I.

Alleges that it is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph I of the Complaint.

II.

Admits the allegations contained in Paragraph II of the Complaint.

III.

Admits the allegations contained in Paragraph III of the Complaint.

IV.

Denies the allegations contained in Paragraph IV of the complaint and in that regard states that there is not and never has been any agreement, oral, written or tacit, between Respondent Morrison-Knudsen and Respondent Union whereby employees or prospective employees of Respondent Morrison-Knudsen were hired upon the condition that they belong to Respondent Union or be cleared through Respondent Union.

V.

Denies the allegations contained in Paragraph V of the Complaint.

VI.

Denies the allegations contained in Paragraph VI of the Complaint.

VII.

Alleges that it is without knowledge or information sufficient to form a belief as to the allegations

General Counsel's Exhibit No. 1-I—(Continued) contained in Paragraph VII of the Complaint, except to admit that there was, during the time here in question, a written agreement to which Respondents were signators.

VIII.

Denies the allegations contained in Paragraph VIII of the Complaint.

IX.

Alleges that it is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph IX of the Complaint.

X.

Alleges that it is without knowledge or information sufficient to form a belief as to the allegations contained in Paragraph X of the Complaint.

XI.

Denies the allegations contained in Paragraph XI of the Complaint.

XII.

Denies the allegations contained in Paragraph XII of the Complaint.

XIII.

Denies the allegations contained in Paragraph XIII of the Complaint.

Second Defense

For further answer to the complaint Respondent Union states as follows:

General Counsel's Exhibit No. 1-I—(Continued)

I.

There is no agreement, understanding or practice whatsoever, written, oral or tacit, between the Respondents herein.

II.

Respondent Morrison-Knudsen in its jobs at Hinchinbrook, Tatalina, Bethel and Aniak, among others, all in the Territory of Alaska, employed numerous individuals who were not members of Respondent Union at the time of so hiring, many of whom never did become members of Respondent Union.

III.

Respondent Morrison-Knudsen entered into the employer-employee relationship with numerous individuals at the job sites at Hinchinbrook, Tatalina, Bethel and Aniak, and others, all within the Territory of Alaska, without those individuals ever being referred by Respondent Union and as a matter of fact, without Respondent Union being aware that they were hired.

IV.

Respondent Union has never by words, inferences or innuendos made threats or threats of reprisals to Respondent Morrison-Knudsen which would cause Respondent Morrison-Knudsen to discriminate against employees or prospective employees in violation of rights guaranteed under the Taft-Hartley Act.

Wherefore Respondent Union prays that the Gen-

General Counsel's Exhibit No. 1-I—(Continued)
eral Counsel take nothing by its Complaint and that the same be dismissed.

/s/ J. M. CLARK,
President, International Hod Carriers, Building, and Common Laborers Union of America, Local 341, AFL-CIO.

HARTLIEB, GROH & RADER,
/s/ By GORDON W. HARTLIEB,
Attorney for Local 341.

Admitted in Evidence September 9, 1957.

GENERAL COUNSEL'S EXHIBIT No. 1-K

[Title of Board and Causes.]

ANSWER OF MORRISON-KNUDSEN COMPANY, INC. TO CONSOLIDATED COMPLAINT

Comes now Morrison-Knudsen Company, Inc., a corporation, and for answer to the Consolidated Complaint in the above entitled cases numbered 19-CA-1405 and 19-CB-450, and pursuant to the "Order Consolidating Cases and Notice of Hearing" submits the following Answer to the charges made:

I.

For answer to Paragraph I admits that Morrison-Knudsen Company, Inc. is a corporation licensed to engage in business in the State of Idaho and in the Territory of Alaska, having its principal office

General Counsel's Exhibit No. 1-K—(Continued)

in Boise, Idaho and a district office in Anchorage, Alaska; that it is engaged in the engineering of and in the performance of construction work in a number of states in the United States and in the Territory of Alaska, for which services it annually derives an income in excess of $10,000,000, and that during the period referred to in the Complaint was engaged in constructing defense facilities for and pursuant to a direct contract with the United States Government. Respondent further admits that it is an employer within the meaning of Section 2 (2), whose operations affect commerce within the meaning of Section 2 (6) and (7) of the Act.

II.

Respondent Morrison-Knudsen Company, Inc. states that it does not have specific knowledge or information as to the facts alleged in Paragraph II of the Consolidated Complaint but generally believes that the same are true.

III.

For answer to Paragraph III, admits that Denton R. Moore filed charges against Respondent Morrison-Knudsen Company, Inc. and Respondent Local 341 on October 9, 1956, and states that it does not have sufficient knowledge or information upon which to form a belief as to the truth of the other allegations in said paragraph contained and therefore denies the same.

IV.

Respondent Morrison-Knudsen Company, Inc.

General Counsel's Exhibit No. 1-K—(Continued) specifically denies each and every allegation as contained in Paragraph IV of the Consolidated Complaint, and the whole thereof.

V.

With respect to Paragraph V of the Consolidated Complaint, Respondent Morrison-Knudsen Company, Inc. specifically denies that there was any "agreement, arrangement or practice" as referred to in Paragraph IV, and states that it has no knowledge or information as to whether Respondent Local 341 was obligated to procure employment for its members in preference to non-members, and therefore denies said allegation.

VI.

Respondent Morrison-Knudsen Company, Inc. specifically denies each and every allegation as contained in Paragraph VI of the Consolidated Complaint, and the whole thereof.

VII.

Respondent Morrison-Knudsen Company, Inc. denies each and every allegation as contained in Paragraph VII of the Consolidated Complaint, except it is admitted that Morrison-Knudsen Company, Inc., through the Associated General Contractors of America, Inc., Alaska Chapter, was a party to an "Alaska Master Labor Agreement, 1956", to which International Hod Carriers, Building, and Common Laborers Union of America, Local 341 (Anchorage), was also a party.

General Counsel's Exhibit No. 1-K—(Continued)

VIII.

For answer to Paragraph VIII of the Consolidated Complaint, Respondent Morrison - Knudsen Company, Inc. specifically denies that Respondent Local 341 at any time was a "hiring agent" of Respondent Morrison-Knudsen Company, Inc., or that membership in Local 341 was ever required by Morrison-Knudsen Company, Inc. as a condition of hire of any of the persons in said paragraph named or of any other person whatsoever.

IX.

For answer to Paragraph IX, Respondent Morrison-Knudsen Company, Inc. specifically denies each and every allegation in said paragraph contained, and the whole thereof.

X.

For answer to Paragraph X of the Consolidated Complaint, Respondent Morrison - Knudsen Company, Inc. denies each and every allegation in said paragraph contained, and the whole thereof.

XI.

For answer to Paragraph XI of the Consolidated Complaint, Respondent Morrison-Knudsen, Inc., denies each and every allegation in said paragraph contained, and the whole thereof.

XII.

As to Paragraph XII of the Consolidated Complaint, Respondent Morrison - Knudsen Company, Inc. states that it has no knowledge or information

General Counsel's Exhibit No. 1-K—(Continued)

as to which of any persons employed by it during the year 1956 were members of or paid initiation fees or dues to Respondent Local 341, and therefore denies each and every allegation in said paragraph contained.

XIII.

For answer to Paragraph XIII of the Consolidated Complaint, Respondent Morrison - Knudsen Company, Inc. specifically denies that it has engaged in any unfair labor practices whatsoever as in said Complaint alleged, or as referred to in said paragraph, and therefore denies each and every allegation in said paragraph, and the whole thereof.

Wherefore, having fully answered the charges and allegations as set forth in the Consolidated Complaint herein, Respondent Morrison - Knudsen Company, Inc. prays that said Complaint may be dismissed.

MORRISON-KNUDSEN COMPANY, INC.,

/s/ By R. B. SNOW,
Assistant Secretary.

ALLEN, DeGARMO & LEEDY,
Attorneys for Respondent, Morrison-Knudsen Company, Inc.

Duly Verified.

Admitted in Evidence September 9, 1957.

[Title of Board and Causes.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Statement of the Case

Upon two separate charges duly filed on October 9, 1956, by Denton R. Moore, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel[1] and the Board, by the then Acting Regional Director for the Nineteenth Region (Seattle, Washington), issued his consolidated complaint, dated August 2, 1957,[2] against Morrison-Knudsen Company, Inc., herein called M-K, and International Hod Carriers, Building, and Common Laborers Union of America, Local 341, AFL-CIO, herein called Local 341, alleging that M-K had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Section 8 (a) (3) and (1) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, as amended, herein called the Act, and that Local 341 had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and (2) and Section 2 (6) and (7) of the Act.

More specifically, the consolidated complaint alleged that (1) during the 6-month period immedi-

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[1] This term specifically includes counsel for the General Counsel appearing at the hearing.

[2] On the same day, the aforesaid Acting Regional Director issued and served upon the parties an order consolidating the above-numbered cases.

ately preceding the filing of the charges herein, October 9, 1956, and at all times thereafter, M-K and Local 341, had an unwritten agreement, arrangement, or practice whereby (a) applicants for jobs as construction laborers with M-K were obligated to be cleared by Local 341 as a condition of hire, (b) Local 341 was obligated at times to procure employment with M-K for its members in preference to nonmembers, and (c) M-K, during the 1956 construction season, used the facilities and dispatching personnel of Local 341 to determine the qualifications of applicants seeking jobs as construction laborers with it; (2) during the aforesaid 6-month period, and thereafter, the parties herein had a written agreement which permitted Local 341 to discipline its members in the employ of M-K without limitation; (3) Local 341, while functioning as hiring agent for M-K, did, on or about June 11, 1956, require eight named applicants for jobs with M-K to seek membership in said labor organization as a condition of hire and dispatch to M-K's job sites; and (4) under the aforesaid agreements, arrangements, or practices, M-K refused to treat as eligible for employment as construction laborers at its Big Mountain construction site near Lake Iliamna, any local applicants at Big Mountain until such time as Local 341 had given preference to its members and to others then accepted as members, who desired dispatch for such employment, and thereby deferring until mid-August the employment (except for casual employment as cargo handlers) 26 named local applicants.

M-K and Local 341 each duly filed due and timely answers to the consolidated complaint denying the commission of the unfair labor practices alleged.

Pursuant to due notice, a hearing was held on various days between September 9 and October 31, 1957, at Anchorage, Big Mountain, and Iliamna, Alaska, and at Seattle, Washington, before the undersigned, the duly designated Trial Examiner. The General Counsel, M-K, and Local 341 were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce pertinent evidence, to argue orally at the conclusion of the taking of the evidence, and to file briefs with the undersigned. A brief has been received from counsel for M-K which has been carefully considered.

At the conclusion of the General Counsel's case-in-chief, counsel for Local 341 moved to dismiss the allegations of the consolidated complaint with respect to his client for lack of proof. The motion was granted over the objection of the General Counsel. A similar motion was made by counsel for M-K to dismiss the consolidated complaint as to M-K, which was denied.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The Business Operations of Morrison-Knudsen Company, Inc.

M-K, an Idaho corporation, having its principal

offices and place of business in Boise, Idaho, is engaged in the engineering and construction business in several States of the United States and in the Territory of Alaska from which it derives an annual income in excess of $10,000,000. One of the projects in which it was engaged in Alaska at the time of the hearing herein was the construction of certain defense facilities for the United States Government for which it is paid in excess of $1,000,000 a year.

Upon the above undisputed facts, the undersigned finds that M-K is engaged in, and during all times material herein was engaged in, commerce within the meaning of the Act and that it will effectuate the policies of the Act for the Board to assert jurisdiction in this proceeding.

II. The Labor Organization Involved

International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, is a labor organization admitting to membership employees of M-K.

III. The Unfair Labor Practices of M-K

A. Prefatory Statement

The sole question to be resolved here is whether M-K violated the Act when it requested the four University of Washington athletes named in the complaint and who testified herein, and others, to join Local 341 and to be cleared and dispatched by it, before M-K would put them to work at one of its Alaskan job sites.[3]

[3] As noted above, the undersigned, at the conclu-

B. The Pertinent Facts

The credited evidence discloses that Maris A. Abolins, Ronald S. Crowe, Joel I. Garnes, and Robert Bleek, athletes who were preparing to enter the University of Washington in the Fall of 1956,[4] and who had been promised employment in Alaska for the Summer by M-K as a result of requests made to M-K by the University Athletic Department, ar-

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sion of the General Counsel's case-in-chief, dismissed the consolidated complaint with respect to Local 341. Since the undersigned is convinced, and finds, that the allegations of the consolidated complaint with reference to the refusal of M-K "to treat as eligible for employment as construction laborers at its Big Mountain construction site near Lake Iliamna, any local applicants at Big Mountain until such time as Respondent Local 341 had given preference to its members and to others then accepted as members, who desired dispatch for such employment, and thereby deferred until mid-August the employment (except for casual employment as cargo handlers)" the 26 persons named in the consolidated complaint, have not been sustained by the credited evidence, he recommends that said allegations be dismissed. The undersigned further recommends that the allegations of the consolidated complaint that M-K permitted Local 341 unlimited authority to discipline its members in M-K employ be dismissed for lack of substantial evidence. In addition, the undersigned has given no consideration as to whether the M-K employment application (G.C. 4) in use during the period in question, which application specifically calls for the applicant to disclose his union affiliation was violative of the Act for the sole reason that the consolidated complaint raised no such issue.

[4] Unless otherwise noted all dates hereinafter refer to 1956.

rived in Anchorage on June 10, and on the following day called at the offices of Aner W. Erickson, M-K's Alaska District Manager and the person to whom the Athletic Department told said students to contact. Because Erickson was not in the office when the four students arrived they were ushered into Harold M. Haugen's office, the then office manager for M-K's lump sum contract[5] and the person whom Erickson had previously informed that he had promised employment to five college students.

Abolins testified that during the course of the interview he, Crowe, Garnes, and Bleek had with Haugen,[6] they were told by Haugen that they would have to go through the Union Hall and then they would be dispatched to a job site. Abolins further testified that because of the lapse of time between the date of his interview with Haugen and the date he testified in the instant proceeding he could not remember Haugen's exact words but that the "intimation was unmistakable" that what Haugen intended to convey to him and his three companions was that they would have to join Local 341 in order to obtain a laborer's job with M-K.[7]

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[5] This contract was administered separately and by different personnel officials than the so-called White Alice contract. The employees working under the latter contract are the only ones, except Haugen, involved in these proceedings.

[6] Neither Abolins, Crowe, nor Garnes could recall Haugen's name. The record, however, is manifestly clear, and the undersigned finds, that the person who interviewed Abolins, Crowe, Garnes, and Bleek on June 11 was, in fact, Haugen.

[7] The following testimony elicited from Haugen

Crowe testified that at the above referred to interview, Haugen stated, to quote Crowe, "he had expected us, that we had jobs, that there were a couple of steps to go through and we would be sent out immediately. First, we would have to see the Union, then [go] to M-K employment office for dispatch. * * * I don't know what he said exactly. He said one of the first steps would be to go through the union and then through the dispatch."

According to Garnes, Haugen stated at the aforesaid interview, to quote Garnes, "we would have to join the union before we could work." On cross-examination by counsel for M-K, Garnes testified in part as follows:

Q. Mr. Crowe mentioned that he did not recall anyone telling them they had to join the union, that Mr. Haugen advised that he check with the

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on cross-examination by the General Counsel bears significantly upon Abolins' interpretation of Haugen's above referred to remarks:

Q. As soon as they (the four students) arrived you called the union hall and got ahold of Harold Groothias and told them (sic) the boys were there?

A. Yes, sir.

Q. And Harold came down and signed them up in the union?

A. That I am not aware of.

Q. Why do you think Harold came down to see them?

A. Well, I believe in most instances they always saw those men that we checked through the union before they were dispatched.

Q. Isn't it obvious that the reason they (sic) saw them was that he signed them in the union?

A. I think that is reasonable to expect. That would be one of the chief objectives or interest.

union. Does your recollection differ from Mr. Crowe's?

A. I am quite sure Mr. Haugen said we had to join the union before we could go to work.

Q. Did you question that?

A. No, I didn't.

* * * * *

Q. Did you ask Mr. Haugen if you had to join a union?

A. No, he just told us we had to.

Q. What did he say?

A. He said we had to join the union before we could go to work.

Q. Are you sure he didn't say that you ought to check with the union?

A. No, he didn't say anything like that.

Q. Did he ask you if you wanted to join the union?

A. No, he didn't ask us if we wanted to.

Haugen testified that he did not discuss "the question of union relationship" of the four named students with them on June 11 and had "no recollection of saying anything to them about a union or unions, except to the extent that I told them that I would like to have them check through the laborer's local since they were going out on one of the projects as a laborer." He further testified that the reason he asked the students to "check through the laborer's local" was because, "That was simply a practice that had been going on for some time, principally, I suppose so that the unions

would know who [were] employed on our projects, how many union and how many non-union."

William A. Wyman, the fifth University of Washington athlete referred to in the record, testified, and the undersigned finds, that he arrived in Anchorage on June 12; that the following day he went to the offices of M-K and saw either Sean Brady, M-K's then assistant to the personnel manager, or C. E. King, M-K's assistant project manager on the White Alice construction job, and that the following there ensued:

> At any rate, whoever I talked to[8] asked me a few questions about the football team and what not and told me that the other four men had gone out yesterday and that I would be going out the following day and told me that I would be going too, and told me that I would need a dispatch slip. They said that I would have to get that from the local union, and they said that after I got my dispatch slip, I could go back to the hotel and wait until the following morning when I could take a limousine out to the airfield and take a plane to the job site.

Wyman further testified, and the undersigned finds, that upon leaving M-K's offices he went to Local

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[8] King testified that after inquiring about the condition of the University of Washington's football team and after advising Wyman that he had a job, he took him to either Brady or to Personnel Manager Raoul Wargny, where he introduced Wyman and then immediately returned to his own office. Brady testified but was not questioned about Wyman.

341, where he signed a membership application blank, arranged to pay the required initiation fees and dues at a later date, received a dispatch slip, and the following day was shipped to the Oniak job site.

In the light of the entire record which has been very carefully scrutinized by the undersigned, coupled with the fact that Abolins, Crowe, and Garnes each particularly impressed the undersigned as being one who was careful with the truth and meticulous in not enlarging his testimony beyond his actual memory of what occurred, while Haugen, on the other hand, appeared to be attempting to conform his testimony to what he considered to be to the best interest of M-K, the undersigned finds the testimony of Abolins, Crowe, and Garnes, regarding the June 11 interview with Haugen to be substantially in accord with the facts.[9]

The undersigned further finds that Haugen stated, in effect, at his June 11 interview with Abolins, Crowe, Garnes, and Bleek that they would have to join Local 341 in order to obtain a laborer's job with M-K. This finding is buttressed by the following: (1) Prior to the five college students arriving in Anchorage, Haugen had telephoned Groo-

[9] This is not to say that at times Abolins, Crowe, and Garnes were not confused on certain matters or that there were not variations in their objectivity and convincingness. But it also should be noted that the candor with which each admitted that he could not be certain as to the exact words used, only serves to add credence to what a careful study of their testimony shows that they honestly believed to be the facts.

thias,[10] business agent of Local 341, and told him, to quote from Haugen's testimony, "These boys would be arriving soon and that they had been promised employment and would be going out to one or more of our projects as laborers"; (2) on June 11, Haugen telephoned Groothias and told him, to again quote Haugen, "The boys were in my office and would be dispatched to the job, either that day or the following day"; (3) Groothias' reply to the immediately above quote, to further quote Haugen, "He would like to see them but he didn't want them to come to the hall. * * * He said the hall was full of men and that he would like to come down to our yard and see them"; (4) Groothias' visit to the offices of M-K shortly after the above-mentioned telephone conversation where Haugen introduced Groothias to Abolins, Crowe, Garnes, and Bleek; (5) Groothias' signing up the above-named four in Local 341, agreeing to accept the required initiation fees and dues at a later date, and then driving them to the White Alice project personnel offices where, outside of Groothias' presence, they were instructed to obtain Local 341 clearance and then return to their motel to await shipping orders.

C. Concluding Findings

Section 8 (a) (3) of the Act enjoins employers from practicing "discrimination in regard to hire * * *" of employees so as to "encourage or dis-

[10] Also referred to in the record as Groothius and Groothuis.

courage membership in any labor organization.[11] An employer, of course, violates this prohibition if he maintains a closed shop, making membership in a union a prerequisite to initial employment in his establishment.[12] The statutory ban on discrimination with regard to hire likewise applies where an employer refers applicants for employment to a union to obtain a clearance before putting the applicant to work, thereby transferring to the union the power to veto his employment of job applicants, at least as to those applicants for jobs who are not members of the union, for it is obvious that an employer manifestly "encourage(s) membership" in the union when he requires nonmembers, as here, to obtain said union's clearance as a prerequisite to obtaining a job.[13]

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[11] The so-called union shop proviso in the Act was amended in 1947 so as to outlaw union-security agreements making union membership a condition of employment at any time prior to the thirtieth day following the beginning of such employment. The Senate sponsors of this amendment declared that its purpose was to abolish hiring practices prevalent "in the maritime industry and to a large extent in the construction industry" which created "too great a barrier to free employment to be longer tolerated." S. Rep. No. 105, 80th Cong., 1st Sess., p. 6; see also statement by Senator Taft at 93 Cong. Rec. 3836.

[12] N. L. R. B. v. National Maritime Union, 175 F. 2d 686 (C.A. 2); N. L. R. B. v. Arthur G. McKee and Co., 196 F. 2d 636 (C.A. 5); N. L. R. B. v. Daniel Hamm Draying Co., 185 F. 2d 1020 (C.A. 5); N. L. R. B. v. Fry Roofing Company, 193 F. 2d 324 (C.A. 9).

[13] See N. L. R. B. v. Radio Officers' Union, 347

The evidence, as epitomized above, overwhelmingly supports a finding that M-K reserved its laborer jobs arising out of its Anchorage offices for persons who were members of Local 341 or able to secure Local 341 clearance. Haugen made it clear to the four students he interviewed on June 11, that they would not be assigned to any job unless or until they had joined Local 341 and had received its clearances.[14]

Upon the record as a whole, the undersigned finds that by withholding job assignments to Abolins, Crowe, Garnes, Bleek, and Wyman until they, and each of them, had joined Local 341 and had ob-

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U.S. 17; N. L. R. B. v. Arthur G. McKee and Co., supra; cf., Webb Construction Co. v. N. L. R. B., 196 F. 2d 702 (C.A. 8).

[14] M-K contended at the hearing and in its brief that Haugen had no authority to hire any person for the White Alice project inasmuch as this function was solely in the hands of Wargny, the personnel manager of that project, subject, of course, to Erickson's instructions. Be this as it may, Haugen was the ranking M-K official on the scene at the time when Abolins, Crowe, Garnes, and Bleek presented themselves for employment. Without disavowing his authority to dispose of their applications, he arranged for Groothias to interview them at the M-K offices, and did not even intimate to the four applicants that Wargny was the proper person for them to see. For Haugen's unlawful conduct, described above, M-K was manifestly responsible, whether or not its agent overstepped undisclosed limitations upon his authority. International Association of Machinists v. N. L. R. B., 311 U.S. 72; N. L. R. B. v. Security Warehouse and Cold Storage Co., 136 F. 2d 829 (C.A. 9); N. L. R. B. v. Acme Mattress Co., 192 F. 2d 524 (C.A. 7); and Section 2 (13) of the Act.

tained job clearances from it, M-K violated Section 8 (a) (3) of the Act,[15] and by engaging in such discriminatory hiring practices it interfered with, restrained, and coerced its employees and prospective employees in the rights guaranteed by Section 7 of the Act thereby violating Section 8 (a) (1) thereof.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of M-K, set forth in Section III above, occurring in connection with its operations, described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and such of them as have been found to constitute unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that M-K has engaged in unfair labor practices, violative of Section 8 (a) (1) of the Act, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the record does not sustain the allegations of the consolidated complaint that M-K unlawfully permitted Local 341 unlimited

[15] See Northern California Chapter, The Associated General Contractors of America, Inc., et al., 119 NLRB No. 133.

power to discipline M-K employee-members and the allegations that M-K discriminatorily refused to hire local inhabitants on the White Alice project, the undersigned will recommend that said allegations be dismissed.

Upon the basis of the foregoing findings of fact, and of the entire record in this proceeding, the undersigned makes the following:

Conclusions of Law

1. Morrison-Knudsen Company, Inc., is an employer within the meaning of Section 2 (2) of the Act.

2. International Hod Carriers, Building, and Common Laborers Union of America, Local 341, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.

3. By encouraging membership in Local 341, by refusing employment to Abolins, Crowe, Garnes, Bleek, Wyman, and others, unless and until they had joined Local 341 and had received its job clearance, M-K has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (3) of the Act.

4. By interfering with, restraining, and coercing employees, and prospective employees, in the exercise of the rights guaranteed by Section 7 of the Act, M-K has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

5. The aforesaid unfair labor practices are un-

fair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

6. The record does not sustain the allegations of the consolidated complaint that M-K discriminated against local inhabitants on the White Alice project nor does it sustain the allegations that M-K unlawfully permitted Local 341 unlimited power to discipline M-K employee-members.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this proceeding, the undersigned recommends that Morrison-Knudsen Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Encouraging membership in Local 341, or in any other labor organization, by refusing employment to its employees and to prospective employees unless and until they join Local 341 and receive its clearance, or in any other manner discriminating against employees and prospective employees in regard to their hire or tenure of employment or any term or condition of employment.

(b) In any like or related manner interfering with, restraining or coercing employees or prospective employees in the exercise of their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to

refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the undersigned finds will effectuate the purposes of the Act.

(a) Post in conspicuous places at their principal offices in Anchorage, Alaska, including places where notices to its employees are customarily posted, copies of the notice attached hereto and marked Appendix A. Copies of said notice, to be furnished by the Regional Director of the Nineteenth Region of the Board, shall, after being signed by a duly authorized representative of Morrison-Knudsen Company, Inc., be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by M-K to insure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the aforesaid Regional Director, in writing, within 20 days from the receipt of this Intermediate Report and Recommended Order what steps it has taken to comply therewith.

It is further recommended that unless M-K shall within 20 days of the receipt of this Intermediate Report and Recommended Order notify the Regional Director, in writing, that it will comply with the foregoing recommendations, the Board issue an order requiring M-K to take the action aforesaid.

It is also recommended that the allegation of the

consolidated complaint that M-K discriminated against local inhabitants on the White Alice project or that it unlawfully permitted Local 341 unlimited power to discipline M-K employee-members, be dismissed.

Dated this 20th day of January, 1958.

/s/ HOWARD MYERS,
Trial Examiner.

APPENDIX A

Notice to All Employees and All Applicants for Employment. Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees and applicants for employment that:

We Will Not encourage membership in International Hod Carriers, Building, and Common Laborers Union of America, Local 341, AFL-CIO, or in any other labor organization, by requiring our employees or applicants for employment to join the aforesaid union, or any other labor organization, in order to obtain employment with us as laborers or in any other manner discriminate against employees or applicants for employment in regard to their hire or tenure of employment or any term or condition of employment.

We Will Not, in any like or related manner, interfere with, restrain, or coerce employees or applicants for employment in the exercise of their right

to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities, except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

All our employees and applicants for employment are free to become or remain members of the above-named Union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the amended Act.

Morrison-Knudsen Company, Inc.
(Employer)

Dated.....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Causes.]

GENERAL COUNSEL'S EXCEPTIONS TO INTERMEDIATE REPORT

Comes now the undersigned Counsel for the General Counsel and hereby excepts to the Interme-

diate Report of the Trial Examiner issued in the above entitled cause of action against Morrison-Knudsen Company, Inc., herein called Respondent Employer, and International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, herein called Respondent Union.

Reference to Intermediate Report:

I.

Page 2, lines 1 to 11; Page 8, lines 14 to 27—The failure to find and conclude as a matter of law that Respondent Employer and Respondent Union had an unlawful unwritten closed-shop agreement, arrangement or practice, which required applicants for jobs with Respondent Employer to be cleared by Respondent Union as a condition of hire.

(GC Ex. 1-E, par. 8; R. 9 to 11; R. 23, ll. 1 to 25; R. 34, ll. 18 to 25; R. 36, ll. 6 to 19; R. 37, ll. 5 to 25; R. 44, ll. 13 to 21; R. 46, ll. 4 to 21; R. 45, ll. 5 to 10; R. 122, l. 18 to R. 132, l. 24.)

II.

Page 3, lines 37 to 39—The dismissal of the complaint with respect to Respondent Union.

(R. 243, ll. 9 to 15; R. 244, ll. 19 and 20.)

III.

Page 3, lines 40 to 49; Page 8, lines 38 to 42; Page 9, lines 34 to 37—The dismissal of the allegations of the complaint that 26 persons were deferred in employment because Respondent Union had given preference in employment to its members.

(GC Ex. 1-E, par. 9.)

IV.

Page 3, lines 51 to 54; Page 8, lines 38 to 42; Page 9, lines 34 to 37—The dismissal of the allegations of the complaint that Respondent Employer permitted Respondent Union to exercise unlimited authority to discipline its members in the employ of Respondent Employer.

(GC Ex. 1-E, par. 7; GC Ex. 5, Article IV.)

V.

Page 2, lines 6 to 8—The failure to find Respondents had an unwritten agreement, arrangement, or practice, whereby applicants for jobs with Respondent Employer were obligated to be cleared by Respondent Union as a condition of hire.

(Record references as cited in Exception I above, and GC Ex. 1-E, par. 4.)

VI.

Page 2, lines 8 to 11—The failure to find that Respondent Employer used the facilities and dispatching personnel of Respondent Union to determine the qualifications of applicants for employment.

(GC Ex. 1-E, par. 6, and record references cited in Exception I above.)

VII.

Page 9, lines 13 to 22—The failure to order Respondents to post notices at all construction sites during the employment season and within the Territorial jurisdiction of Respondent Union.

VIII.

Page 9, lines 10 to 22—The failure to order joint

and several disgorgement by Respondent Employer and Respondent Union of all moneys paid to Respondent Union by the discriminatees.

The foregoing exceptions are based upon all the evidence in the record made in this case and for the reason that the rulings, findings and conclusions and omissions thereof are contrary to the facts and the evidence, and are contrary to law.

Dated and signed at Seattle, Washington, this 10th day of February, 1958.

/s/ ROBERT E. TILLMAN,
Counsel for the General Counsel.

[Title of Board and Cause No. 1405.]

EXCEPTIONS OF MORRISON - KNUDSEN COMPANY, INC., TO INTERMEDIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER

Morrison-Knudsen Company, Inc., one of the above named Respondents, does hereby respectfully except to the Intermediate Report and Recommended Order of the Trial Examiner, entered in the above entitled case on the 20th day of January, 1958, as follows:

Findings

Exception No. 1:

To that portion of the Findings, contained on Page 7, Lines 20 through 23, which provides:

"* * * engaging in such discriminatory hiring practices it interfered with, restrained, and coerced

its employees and prospective employees in the rights guaranteed by Section 7 of the Act thereby violating Section 8 (a) (1) thereof."

Recommended Order

Exception No. 2:

To that portion of Paragraph 1(a) of the Recommended Order, appearing on Page 8, Lines 56 through 59, which provides:

"* * * or in any other manner discriminating against employees and prospective employees in regard to their hire or tenure of employment or any term or condition of employment."

Exception No. 3:

To the provisions of Paragraph 1(b) of the Recommended Order, commencing on Page 8, Line 60 to Page 9, Line 8, and providing:

"In any like or related manner interfering with, restraining or coercing employees or prospective employees in the exercise of their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities, except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act."

Exception No. 4:

To that portion of Appendix A referred to in Paragraph 2(a) of the Recommended Order which provides:

"* * * or in any other manner discriminate against employees or applicants for employment in regard to their hire or tenure of employment of any term or condition of employment."

Exception No. 5:

To that portion of Appendix A referred to in Paragraph 2 (a) of the Recommended Order which provides:

"We Will Not in any like or related manner, interfere with, restrain, or coerce employees or applicants for employment in the exercise of their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities, except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act."

Dated and respectfully submitted this ..... day of February, 1958.

ALLEN, DeGARMO & LEEDY,
Attorneys for the Respondent,
Morrison-Knudsen Company, Inc.

TRIAL EXAMINER'S EXHIBIT 1

United States of America
Before the National Labor Relations Board

Case No. 19-CA-1405
MORRISON-KNUDSEN COMPANY, INC. and DENTON R. MOORE, An Individual.

Case No. 19-CB-450
INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 341, AFL-CIO, and DENTON R. MOORE, An Individual.

DECISION AND ORDER REMANDING CASE

Hearing upon the consolidated complaint herein was held before Trial Examiner Howard Myers between September 9 and October 31, 1957. On September 13, 1957, at the close of the General Counsel's case, the Trial Examiner orally granted a motion of the Respondent Union, herein called the Union, to dismiss the consolidated complaint as to it. The complaint alleged, inter alia, that the Respondent Company, herein called the Company, and the Union had an unwritten agreement, arrangement, or practice requiring that applicants for jobs with the Employer be cleared by, and join, the Union as a condition of hire, and that such arrangement or practice violated Sections 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act.

The trial Examiner found that the Company vio-

Trial Examiner's Exhibit 1—(Continued)

lated Section 8 (a) (3) of the Act by withholding job assignments from 5 prospective employees until they had joined the Union and obtained job clearances from it. He further found that by engaging in such "discriminatory hiring practice" the Company violated Section 8 (a) (1) of the Act. He recommended, however, that all other allegations of the complaint against the Company be dismissed, and, as noted above, at the completion of the General Counsel's case, dismissed the complaint as to the Union.

The General Counsel excepts, inter alia, to the dismissal of the complaint as to the Union, contending that the evidence adduced at the hearing established that the Union was a party to a closed shop arrangement violative of Section 8 (b) (2) and (1) (A) of the Act, and the General Counsel requests the Board so to find upon the present record. In support of this contention, the General Counsel points to the Company's practice, as found by the Trial Examiner, of requiring union clearance and membership of applicants for employment, plus testimony, not discussed by the Trial Examiner, to the effect that (1) the Company was "allowed" to specify the names of 50 percent of the employees to be dispatched by the Union; (2) the Company inquired as to whether particular job applicants were in good standing with the Union and accepted substitutes from the Union if such applicants were not in good standing; (3) on one occasion, a union job steward told a new employee

Trial Examiner's Exhibit 1—(Continued)

that his first financial commitment was to pay his dues to the Union or he would be put off the job; and (4) on another occasion, the business agent of the Union told a prospective employee that he would be given a dispatch slip as soon as he completed his application for membership in the Union. This testimony stands uncontradicted in the record.

We find that the foregoing evidence was sufficient to establish a prima facie case of violation by the Respondent Union of Sections 8 (b) (1) (A) and 8 (b) (2) of the Act through participation with the Respondent Company in an illegal closed shop and hiring hall arrangement. Accordingly, we find that the Trial Examiner erred in dismissing the complaint as to the Union upon the record before him, and, we hereby set aside that ruling. The Board, however, is not prepared on the present record to determine, as the General Counsel urges, whether the Union was, in fact, a party to the illegal hiring arrangement alleged in the complaint, since, in view of the dismissal as to the Union at the completion of the General Counsel's case, the Union has not had an opportunity to present its defense. We shall therefore remand the case to the Trial Examiner for further proceedings consistent with this Decision and Order.

Order

It Is Hereby Ordered that the above-entitled case be, and it hereby is, remanded to the Trial Examiner for further proceedings consistent with

Trial Examiner's Exhibit 1—(Continued)

this Decision and Order Remanding Case, including such additional hearing as may be necessary and the preparation and issuance of a Supplemental Intermediate Report, setting forth his findings of fact, conclusions of law, and recommendations with respect to the unfair labor practices by the Union alleged in the complaint and any modifications in the Intermediate Report of January 20, 1958, which may be required in view thereof.

Dated, Washington, D. C., July 31, 1958.

BOYD LEEDOM, Chairman,
PHILIP RAY RODGERS, Member,
STEPHEN S. BEAN, Member,
JOHN H. FANNING, Member,
[Seal] National Labor Relations Board.

TRIAL EXAMINER'S EXHIBIT No. 2

(Copy) [Telegram]

Official Business—Government Rates
From NLRB—Div. of Trial Exmnrs.

Gordon W. Hartlieb Aug. 22, 1958
Box 2068
Anchorage, Alaska
Charles Y. Latimer
407 U. S. Courthouse
Seattle, Washington
Seth W. Morrison
1308 Northern Life Bldg.
Seattle, Washington

Trial Examiner's Exhibit No. 2—(Continued)
Denton R. Moore
Kokhanok Bay, Alaska
Re Morrison-Knudsen et al., 19-CA-1405, CB-450.

This Hearing Is Hereby Reopened and Will Resume for Purpose of Taking Testimony and Hearing Argument at a Room in the United States Court House Bldg. in Anchorage, Alaska, at 10 A.M., September 8, 1958.

Howard Myers,
Trial Examiner.

CC: Howard Myers
Thomas P. Graham
Pamela Adsit

TRIAL EXAMINER'S EXHIBIT No. 3

[Western Union Telegram]

OA 115 1958 Sep 5 AM 2 34
SSV 112 O SEA094 NL PD Anchorage Alaska 4

Howard Myers Trial Examiner, National Labor Relations Board 266 USS Appraisers Bldg S Fran

Re: Morrison-Knudsen, Et Al NLRB Case Numbers 19-CA-1405, 19-CB-450 Respondent Union Rests and Request That Supplemental Intermediate Report Be Based on Evidence Presently in Record Gordon W Hartlieb
19-CA-1405 19-CB-450.

TRIAL EXAMINER'S EXHIBIT No. 4

[Telegram]

Official Business—Government Rates

Chg. Appropriation NLRB

September 5, 1958

Gordon W. Hartlieb, Box 2068, Anchorage Alaska

Charles Y. Latimer, 407 U. S. Courthouse, Seattle, Washington

Seth W. Morrison, 1308 Northern Life Bldg., Seattle, Washington

Denton R. Moore, Kokhanok Bay, Alaska

Alderson Reporting Co., 306 - 9th Street, Washington, D. C.

Re Morrison-Knudsen Et Al., 19-CA-1405, 19-CB-450, Notice of Resumption of Hearing Given August 22, 1958, is Hereby Cancelled and the Hearing Is Closed.

Howard Myers, Trial Examiner.

[Title of Board and Causes.]

SUPPLEMENTAL INTERMEDIATE REPORT AND RECOMMENDED ORDER

At the conclusion of the General Counsel's case-in-chief, the undersigned granted the motion of counsel for Local 341 to dismiss the consolidated complaint as to it.

On January 20, 1958, the undersigned issued his Intermediate Report and Recommended Order, herein called Report, finding that the Respondent Company, herein called M-K, had violated Section

8 (a) (1) and (3) by, among other things, withholding job assignments from five prospective employees until they had joined Local 341. Thereafter the General Counsel duly filed exceptions to said Report.

With respect to the dismissal of the consolidated complaint, as to Local 341, the exceptions alleged that the evidence adduced at the hearing fully established that Local 341 was a party to a closed shop arrangement violative of the Act. In support of this allegation the General Counsel points to certain findings of fact set out in said Report plus certain evidence not discussed therein.

On July 31, the Board issued a Decision and Order [1] remanding the case to the undersigned "for further proceeding consistent with this Decision and Order Remanding Case, including such additional hearing as may be necessary and the preparation and issuance of a Supplemental Intermediate Report, setting forth his findings of facts, conclusions of law, and recommendations with respect to the unfair labor practices by the Union alleged in the complaint and any modifications in the Intermediate Report * * * which may be required in view thereof."

On August 22, the undersigned sent the following telegram [2] to General Counsel, to counsel for each respondent, and to the charging party:

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[1] A copy thereof is hereby received in evidence as Trial Examiner's Exhibit 1.

[2] Copy thereof is hereby received in evidence as Trial Examiner's Exhibit 2.

Re Morrison-Knudsen Et Al., 19-CA-1405, CB-450 This Hearing Is Hereby Reopened and Will Resume for Purpose of Taking Testimony and Hearing Argument at a Room in the United States Court House Bldg. at Anchorage, Alaska, at 10 A.M. September 8, 1958.

On September 5, the undersigned received the following telegram[3] from the Union's counsel, copies of which were sent to the General Counsel and the Company's counsel:

Re: Morrison-Knudsen, Et. Al. NLRB Case Numbers 19-CA-1405, 19-CB-450 Respondent Union Rests and Requests That Supplemental Intermediate Report Be Based on Evidence Presently in Record.

The same day, September 5, the undersigned sent the following telegram[4] to the General Counsel, to counsel for each respondent, and to the charging party:

Re Morrison-Knudsen Et Al., 19-CA-1405, 19-CB-450, Notice of Resumption of Hearing Given August 22, 1958, is hereby Cancelled and the Hearing Is Closed.

The questions to be resolved in this supplemental report are whether (1) during the 6-month period immediately preceding the filing of the charges herein, October 9, 1956, and at all times thereafter,

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[3] Copy thereof is hereby received in evidence as Trial Examiner's Exhibit 3.

[4] Copy thereof is hereby received in evidence as Trial Examiner's Exhibit 4.

M-K and Local 341, had an unwritten agreement, arrangement or practice whereby (a) applicants for jobs as construction laborers with M-K were obligated to be cleared by Local 341 as a condition of hire, (b) Local 341 was obligated at times to procure employment with M-K for its members in preference to nonmembers, and (c) M-K, during the 1956 construction season, used the facilities and dispatching personnel of Local 341 to determine the qualifications of applicants seeking jobs as construction laborers with it; (2) during the aforesaid 6-month period, and thereafter, the parties herein had a written agreement which permitted Local 341 to discipline its members in the employ of M-K without limitation; (3) Local 341, while functioning as hiring agent for M-K, did, on or about June 11, 1956, require five named applicants for jobs with M-K to seek membership in said labor organization as a condition of hire and dispatch to M-K's job sites; and (4) under the aforesaid agreements, arrangements, or practices, M-K refused to treat as eligible for employment as construction laborers at its Big Mountain construction site near Lake Iliamna, any local applicants at Big Mountain until such time as Local 341 had given preference to its members and to others then accepted as members, who desired dispatch for such employment, and thereby deferring until mid-August the employment (except for casual employment as cargo handlers) 26 named local applicants.

There can be no doubt that if Local 341 engaged

in such conduct it violated Section 8 (b) (1) (A) and (2) of the Act.[5]

Upon the entire record in the case, all of which has been carefully read, and parts of which have been reread and rechecked several times, the undersigned makes, in addition to the findings of facts, conclusions of law, and recommendations made in the Report, and following findings, conclusions, and recommendations.

Raoul Wargny credibly testified that from March 3 to until the latter part of July 1956, he was personnel manager and, as such, hired persons for the M-K's so-called White Alice construction job; that when a site superintendent would request his department for a certain laborer by name he would telephone Local 341 and ask if this particular person was in good standing and if he was "eligible to be dispatched for hiring"; that if the said person was available and "eligible" Local 341 "would dispatch him [to us] and we would process him and send him out to the site"; that if Local 341 "failed to dispatch" the requested person because he was not in good standing nor eligible he "would ask for a substitute"; and M-K was "allowed to specify the names of 50 percent of the persons to be dispatched by Local 341; that the five college students involved in this proceeding were processed

[5] N. L. R. B. v. International Brotherhood of Boilermakers, etc., 232 F. 2d 393 (C.A. 3); N. L. R. B. v. Daboll, 216 F. 2d 143 (C.A. 9); Pardee Construction Co., 115 NLRB 126. Also see cases cited in footnotes 12 and 13 of the Report.

in the regular manner; that when said students reported for work he told "them to go down to the union and join it and come back to the office"; and that when they received the necessary dispatch slips and returned to M-K they were processed and each was sent to a different job site.

Wargny credibly testified further that if a requested laborer was not a member of Local 341, it would not clear him and he would not be put to work by M-K; that before a laborer was put to work by M-K, he would have to have a Local 341 clearance or dispatch slip; and that on one occasion he requested Local 341 to dispatch a certain named person but it refused to do so because he "was not a member of the union and they had so many men on the bench that had priority that they didn't want to accept any more."

According to the undenied and credible testimony of Morris A. Abolins, one of the college students mentioned in the Report, Local 341's business representative, Groothias, told him on June 12, when he and the other three students applied for dispatch slips, to quote Abolins, "we would have to join the union [in order to work for M-K] and * * * generally it is accepted practice for the individual, when he desires to join the union, to pay $50 initiation fee at the time he joins. * * * he was making a special exception in our case and he would let us go out there owing him money. But he put it very clearly to us, that if we did not send the money in within the first or second pay

check, he would come out and get us"; and that after he had been at the Big Mountain job site 2 or 3 days he had the following conversation with the Local 341 job steward:

> He asked me if I had paid my dues and I said no. He said that I should pay them with the first check that I got and send it [by] mail [or] give it to him and he would send it on to Anchorage and pay it * * * I said that I had a previous commitment. I said my first check would go for my fare up here * * * He said that my first commitment was, of course, the union or they would put me out of a job. If it hadn't been for them I wouldn't be out there. Well, I finally agreed that I should pay the union with my second pay check which I did.

William A. Wyman, one of the University of Washington athletes referred to in the Report, credibly testified that when he reported for work, at M-K on June 13, he was told by an M-K official that he had to obtain a Local 341 clearance before he could be put to work; that said official telephoned Groothias and said that he was sending him to Local 341 for a dispatch slip; and that when he arrived there he asked Groothias for a dispatch slip and Groothias replied, "Well, we will get the dispatch slip for you as soon as we fill out the application" for membership in Local 341.

The facts summarized above establish that M-K and Local 341 were parties to an unlawful arrange-

ment under which applicants for work were required to become members of Local 341 or be dispatched by Local 341 as a condition of employment. The record further establishes that M-K acceded to Local 341's requirement for dispatch slips as a condition of employment and that Local 341 was aware of this fact. Such joint action by M-K and Local 341 establishes the existence of an arrangement requiring dispatch slips from Local 341, which were only issued after application for membership therein had been made, as a condition of employment by M-K.

Accordingly, the undersigned finds that by participating with M-K in an agreement, understanding, and practice that required laborers who were not members of Local 341, and others, to obtain dispatch slips from Local 341 as a condition of employment, Local 341 has caused M-K to discriminate against its employees in violation of Section 8 (a) (3) of the Act. By engaging in such conduct, the undersigned finds Local 341 has violated Section 8 (b) (1) (A) and (2).[6]

Having found that Local 341 and M-K have violated the Act, the undersigned will recommend that they cease and desist therefrom and take the following affirmative action (in addition to those already

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[6] See N. L. R. B. v. United Ass'n of Journeymen, etc. (J. J. White, Inc.), 239 F. 2d 327 (C.A. 3); International Brotherhood of Teamsters (Lane Construction Co.), 111 NLRB 952, enf. 228 F. 2d 83 (C.A. 2); Alexander-Stafford Corp., 118 NLRB 79. See also Mountain Pacific, 119 NLRB No. 126.

recommended as to M-K in the Report) which the undersigned finds will effectuate the policies of the Act.

It will be recommended that M-K and Local 341, jointly and severally, be required to reimburse to Morris A. Abolins, Ronald S. Crowe, Joel I. Garnes, William A. Wyman, and Robert Bleeck, the five University of Washington athletes referred to in the record, any and all initiation fees and dues paid to Local 341 in order to obtain employment with M-K.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following (in addition to those already made in the Report):

Conclusions of Law

1. By performing, maintaining, or otherwise giving effect to an understanding, arrangement, and practice with M-K, whereby employees or applicants for employment who were not members of Local 341, as well as to those who were members, must obtain clearance or dispatch slips as a condition of employment with M-K, Local 341 has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) of the Act.

2. By restraining and coercing employees and prospective employees of M-K in the exercise of the rights guaranteed in Section 7 of the Act, Local 341 has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law (in addition to those already found in the Report), and upon the entire record in the case, the undersigned recommends (in addition to those already recommended in the Report) that Local 341, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Performing, maintaining, or otherwise giving effect to any understanding, arrangement, and practice, with M-K, or with any other employer, whereby employees or applicants for employment must obtain clearance or dispatch slips from Local 341 as a condition of employment with M-K, except in accordance with Section 8 (a) (3) of the Act;

(b) Causing or attempting to cause M-K, or any other employer, to discriminate against employees or applicants for employment;

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

2. Take the following affirmative action (in addition to that already recommended in the Report) which the undersigned finds will effectuate the policies of the Act:

(a) M-K and Local 341 severally or jointly reimburse Morris A. Abolins, Ronald S. Crowe, Joel I. Garnes, William A. Wyman, and Robert Bleeck for any and all fees and dues paid by them to Local 341 in the manner set forth in the section entitled, "The remedy."

(b) Post at its offices in Anchorage, Alaska, copies of the notice attached hereto and marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by a duly authorized representative of Local 341, be posted by Local 341 immediately upon the receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material;

(c) Mail to the Regional Director for the Nineteenth Region signed copies of the notice for posting, M-K willing, in places within Local 341's territorial jurisdiction where notices to M-K's employees are customarily posted;

(d) Notify the aforesaid Regional Director, in writing, within 20 days from the receipt of this Supplemental Intermediate Report and Recommended Order what steps M-K and Local 341 have taken to comply therewith.

It is further recommended that unless Local 341 and M-K shall within 20 days of the receipt of this Supplemental Intermediate Report and Recom-

mended Order notify the Regional Director, in writing, that they will comply with the foregoing recommendations, the Board issue an order requiring Local 341 and M-K to take the action aforesaid.

It is also recommended that M-K post in conspicuous places at the principal offices in Anchorage, Alaska, including places where notices to its employees are customarily posted, copies of the notice attached hereto and marked Appendix B. Copies of said notice, to be furnished by the Regional Director of the Nineteenth Region of the Board, shall, after being signed by a duly authorized representative of Morrison-Knudsen Company, Inc., be posted by it immediately upon receipt thereof and maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by M-K to insure that said notices are not altered, defaced, or covered by any other material.

Dated this 26th day of September, 1958.

/s/ HOWARD MYERS,
Trial Examiner.

APPENDIX A

Notice: To All Members, and to Employees of and Applicants for Employment With Morrison-Knudsen Company, Inc. Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not perform, maintain, or otherwise

give effect to any understanding, arrangement, and practice, with Morrison-Knudsen Company, Inc., or any other employer, whereby employees or applicants for employment who are, or who are not, members of the undersigned local union must obtain work clearance or dispatch slips from such local union as a condition of employment, except in accordance with Section 8 (a) (3) of the Act.

We Will Not cause or attempt to cause Morrison-Knudsen Company, Inc., or any other employer, to discriminate against employees or applicants for employment.

We Will Not in any like or related manner restrain or coerce employees or prospective employees of Morrison-Knudsen Company, Inc., or any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

We Will return to Morris A. Abolins, Ronald S. Crowe, Joel I. Garnes, William A. Wyman, and Robert Bleeck all fees and dues paid us by them.

International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO,

(Labor Organization.)

Dated.....

By.....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice to All Employees and All Applicants for Employment: Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees and applicants for employment that:

We Will Not encourage membership in International Hod Carriers, Building, and Common Laborers Union of America, Local 341, AFL-CIO, or in any other labor organization, by requiring our employees or applicants for employment to join the aforesaid union, or any other labor organization, in order to obtain employment with us as laborers or in any other manner discriminate against employees or applicants for employment in regard to their hire or tenure of employment or any term or condition of employment.

We Will Not, in any like or related manner, interfere with, restrain, or coerce employees or applicants for employment in the exercise of their right to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities, except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will reimburse Morris A. Abolins, Ronald S. Crowe, Joel I. Garnes, William A. Wyman, and Robert Bleeck for all fees or dues paid by them to Local 341.

All our employees and applicants for employment are free to become or remain members of the above-named Union or any other labor organization except to the extent that this right may be affected by an agreement in conformity with Section 8 (a) (3) of the amended Act.

Morrison-Knudsen Company, Inc.,
(Employer.)

Dated.....

By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Causes.]

EXCEPTIONS OF GENERAL COUNSEL

Comes Now, the undersigned Counsel for the General Counsel, and hereby excepts to the Supplemental Intermediate Report of the Trial Examiner issued in the above entitled cause of action on September 26, 1958, in response to an Order of Remand dated July 31, 1958. Since the exceptions and brief herein are limited in scope, both are combined in this single vehicle.

Morrison-Knudsen Company, Inc., will be called

herein Respondent Employer; and International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, will be called herein Respondent Union.

For greater clarity some prefactory remarks need be made. The issues in this proceeding were raised by a Consolidated Complaint dated August 2, 1957. After trial the original Intermediate Report was issued by the Trial Examiner on January 20, 1958. Counsel for the Respondent Employer filed exceptions to the original Intermediate Report and brief in support of exceptions, as did Counsel for the General Counsel. On the basis of the record made up to that point, the Board issued its Order of Remand. However, the Board has not issued, as yet, a full and complete remedial Decision and Order on the merits of the case against either Respondent. For this reason, it is respectfully submitted that the merits of the exceptions and brief of Counsel for the General Counsel filed on February 10, 1958 remain for active consideration by the Board.

Exceptions

Reference to Intermediate Report:

I.

Page 4, Lines 46-50; Page 5, Lines 48-51—Failure to find an order that Respondents, jointly and severally, be required to reimburse the 26 individuals named in paragraph IX of the Consolidated Complaint for any and all initiation fees and dues paid to Respondent Union for a period from 6 months

prior to the filing of the charge to the completion of the construction work.

II.

Page and Line: None — The failure to find an order that Respondents, jointly and severally, be required to reimburse all other employees of Respondent Employer within a period from 6 months before the filing of the charge to the completion of the construction work who were employed by the Respondent Employer as laborers on the work provided by the Respondent Employer at the "White Alice" construction project, pursuant to the terms provided for in Contract No. 1787, entered into between Respondent Employer and Western Electric on behalf of the Defense Department of the United States (R. 15, ll. 15 to 20; R. 16, l. 3 to 18 l. 11).

III.

Page and Line: None—Renew and incorporate herein by reference, all the exceptions, I to VIII, both inclusive, and supporting record references, set forth in the original Exceptions of Counsel for the General Counsel and bearing the date of February 10, 1958.

Respectfully submitted:

/s/ PATRICK H. WALKER,
Counsel for the General Counsel.

Certificate of Mailing Attached.

[Title of Board and Causes.]

EXCEPTIONS

Exceptions of International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, to Supplemental Intermediate Report and Recommended Order of the Trial Examiner.

Local 341, one of the above-named respondents, does hereby respectfully Except to the Supplemental Intermediate Report and Recommended Order of the Trial Examiner entered in the above entitled case on the 26th day of September, 1958, as follows:

Exception I

Page 3, Lines 15-41—The conclusion that Raoul Wargny testified credibly to the facts therein set out.

Exception II

Page 4, Lines 21-24 — The conclusion that "The facts summarized above establish that M-K and Local 341 were parties to an unlawful arrangement under which applicants for work were required to become members of Local 341 or be dispatched by Local 341 as a condition of employment."

Exception III

Page 4, Lines 24-30—The conclusion that the record establishes M-K acceded to Local 341's requirement for dispatch slips as a condition of employment and that Local 341 was aware of this fact and that such joint action by M-K and Local 341 establishes the existence of an arrangement requiring dis-

patch slips from Local 341, which were only issued after application for membership had been made, as a condition of employment by M-K. In the absence of a finding that Local 341 ever requested M-K to make a dispatch slip or Union membership a condition of employment.

Exception IV

Page 4, Lines 31-40—The apparent finding that by participating with M-K in an agreement, understanding, and practice that required laborers who were not members of Local 341, and others, to obtain dispatch slips from Local 341 as a condition of employment, Local 341 has caused M-K to discriminate against its employees in violation of Section 8 (a) (3) of the Act and that by engaging in such conduct, Local 341 has violated Section 8 (b) (1) (A) and (2) of the Act.

Exception V

Failure to find that there was no evidence in the record to indicate Local 341 had ever demanded that M-K applicants must have dispatch slips from Local 341 or that all applicants must clear with Local 341 as a condition of going to work for Company.

Exception VI

Failure to find that the testimony of Mike Rickterhoff, Record Page 175, Line 18-25, Record Page 176, Line 1-25, Record Page 178, Line 16-18; Fred Olympic, Record Page 199, Line 1-3; Irevin Endruy, Record Page 201, Line 23-25, Record Page

202, Line 11-13; Ira Wassallie, Record Page 205, Line 2-6; Maxim Wassallie, Record Page 208, Line 1-3; Sava Anelon, Record Page 210, Line 7-10; Jack Drew, Record Page 218, Line 5-11, Record Page 218, Line 16-20; show that there was no agreement passive, written, or otherwise, requiring applicants to clear through Local 341 as a condition of employment by M-K Company.

Exception VII

Failure to make any Findings of Fact in the Supplemental Intermediate Report.

Exception VIII

Exception is also taken to the Supplemental Intermediate Report on the grounds that it is:

1. Contrary to the law;
2. Not based on a finding of fact;
3. Contrary to the weight or preponderance of the evidence tending to support the Supplemental Intermediate Report.

Exception IX

Failure by the Hearing Officer to find that the evidence would not support a conclusion that Local 341 by its action on the facts in the Record, was not in violation of the Act.

Exception X

Failure to find that Local 341 had no control over, and was not responsible for, the unilateral action taken by M-K in regard to prospective employees.

Exception XI

Failure to find that the facts would not support the conclusion that Local 341 had an agreement, understanding, arrangement or practice with M-K whereby employees or applicants for employment must obtain clearance or dispatch slips as a condition of employment with M-K.

Exception XII

Page 5, Lines 20-51—The recommendations of the Hearing Officer contained in the Supplemental Intermediate Report Page 5, Line 20-51 are excepted to in their entirety.

Respectfully submitted,

HARTLIEB, GROH AND RADER,
/s/ By GORDON W. HARTLIEB.

Certificate of Mailing Attached.

[Title of Board and Causes.]

EXCEPTIONS OF MORRISON-KNUDSEN COMPANY, INC. TO SUPPLEMENTAL INTERMEDIATE REPORT AND RECOMMENDED ORDER OF THE TRIAL EXAMINER

Morrison-Knudsen Company, Inc., one of the above named Respondents, in addition to the Exceptions heretofore dated and submitted on February 10, 1958 to the initial Intermediate Report and Recommended Order of the Trial Examiner entered

January 20, 1958, does hereby respectfully except to the Supplemental Intermediate Report and Recommended Order of the Trial Examiner, entered in the above entitled case on the 26th day of September, 1958, as follows:

Exception No. I

Page 2, Lines 35-45—To that portion of the Report purporting to establish the issues therein set forth as material issues in this case.

Exception No. II

Page 3, Lines 7-8—To that portion of the Report finding that the conduct described in that portion of the Report to which this Respondent has taken its Exception No. I violates Section 8 (b) (1) (A) and (2) of the Act.

Exception No. III

Page 3, Lines 15-32—To that portion of the Report finding that the testimony of Mr. Raoul Wargny as therein set forth was credible.

Exception No. IV

Page 3, Lines 34-41—To that portion of the Report attributing to Wargny credible testimony that Morrison-Knudsen would not hire a laborer who was not a member of Local 341, that a laborer would not be put to work by Morrison-Knudsen if he did not have a clearance from Local 341, and that Local 341 on one occasion refused to dispatch a certain named person because he was not a member of the Union.

Exception No. V

Page 3, Line 43—To that portion of the Report finding that the testimony of Morris A. Abolins is credible.

Exception No. VI

Page 4, Lines 21-30—To that portion of the Report purporting to find that Morrison-Knudsen and Local 341 were parties to an unlawful arrangement requiring membership in Local 341 as a condition of employment by Morrison-Knudsen.

Exception No. VII

Page 4, Lines 32-37—To that portion of the Report finding that Morrison-Knudsen participated in an agreement as therein alleged and further finding that Local 341 had caused Morrison-Knudsen to discriminate against its employees in violation of the Act.

Exception No. VIII

Page 4, Lines 46-50—To that portion of the Report recommending joint and several reimbursement to the persons therein named.

Exception No. IX

Page 5, Lines 1-9—To that portion of the Report concluding that the requirement of obtaining clearance or dispatch slips from Local 341 by Morrison-Knudsen constitutes an unfair labor practice within the meaning of Section 8 (b) (1) (A) and (2) of the Act.

Exception No. X

Page 5, Lines 47-52—To that portion of the Re-

port recommending that Morrison-Knudsen and Local 341 severally or jointly reimburse the persons therein named for any and all fees and dues paid by them to Local 341.

Exception No. XI

Page 6, Lines 10-26—To that portion of the Report recommending that the Board issue an order requiring Morrison-Knudsen to take the action as therein described and further recommending that Morrison-Knudsen post copies of the notice designated "Exhibit B" as therein provided.

Dated and respectfully submitted this 7th day of November, 1958.

ALLEN, DeGARMO & LEEDY,
/s/ By SETH W. MORRISON,
Attorneys for the Respondent,
Morrison-Knudsen Company, Inc.

Certificate of Mailing Attached.

United States of America
Before The National Labor Relations Board

Case No. 19-CA-1405

MORRISON-KNUDSEN COMPANY, INC., and DENTON R. MOORE, An Individual.

Case No. 19-CB-450

INTERNATIONAL HOD CARRIERS, BUILDING, AND COMMON LABORERS UNION OF AMERICA, LOCAL 341, AFL-CIO, and DENTON R. MOORE, An Individual.

SUPPLEMENTAL DECISION AND ORDER

Hearing upon the consolidated complaint herein was held before Trial Examiner Howard Myers between September 9 and October 31, 1957. On September 13, 1957, at the close of the General Counsel's case, the Trial Examiner orally granted a motion of the Respondent Union, herein called the Union, to dismiss the consolidated complaint as to it. The complaint alleged, inter alia, that the Respondent Company, hereinafter called the Company and the Respondent Union, hereinafter called the Union, had an unwritten agreement, arrangement, or practice requiring that applicants for jobs with the Company be cleared by, and join, the Union as a condition of hire, and that such arrangement or practice violated Sections 8 (a) (3) and (1) and 8 (b) (2) and (1) (A) of the Act.

In his original Intermediate Report herein, the

Trial Examiner found that the Company violated Section 8 (a) (3) and (1) of the Act by withholding job assignments from 5 prospective employees until they had joined the Union and obtained job clearances from it. He recommended, however, that all other allegations of the complaint against the Company be dismissed, and, as noted above, at the completion of the General Counsel's case, dismissed the complaint as to the Union.

In his exceptions to the original Intermediate Report, the General Counsel urged that the evidence adduced at the hearing established that the Union was a party to a closed shop arrangement violative of Section 8 (b) (2) and (1) of the Act. In support of this contention, the General Counsel pointed to the Company's practice, as found by the Trial Examiner, of requiring Union clearance and membership of applicants for employment, and to uncontradicted testimony to the effect that (1) the Company was "allowed" to specify the names of 50 percent of the employees to be dispatched by the Union; (2) the Company inquired as to whether particular job applicants were in good standing with the Union and accepted substitutes from the Union if such applicants were not in good standing; (3) on one occasion, a Union job steward told a new employee that his first financial commitment was to pay his dues to the Union or he would be put off the job; and (4) on another occasion, the business agent of the Union told a prospective employee that he would be given a dispatch slip as soon as he completed his application for membership in the Union.

On July 31, 1958, the Board issued a Decision and Order Remanding Case,[1] in which it found that the foregoing evidence was sufficient to establish a prima facie case of violation by the Union of Section 8 (b) (1) (A) and 8 (b) (2) of the Act through participation with the Company in an illegal closed shop and hiring hall arrangement, and that the Trial Examiner had, therefore, erred in dismissing the complaint as to the Union; and the Board in that Order remanded the case to the Trial Examiner for further proceedings consistent therewith.

Pursuant to that Order, the Trial Examiner on August 22, 1958, advised all parties to the proceeding that the hearing was reopened and would resume on September 8, 1958. On September 5, the Union advised the Trial Examiner that "it rests and requests that the Supplemental Intermediate Report be based on evidence presently in the record." Whereupon, on the same day, the Trial Examiner cancelled the notice of hearing and advised all parties that the hearing was closed.

On September 26, 1958, the Trial Examiner issued his Supplemental Intermediate Report in the above-entitled proceeding, finding that the Respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Supplemental Intermediate Report attached hereto. He also found that the Respondents had not engaged in

[1] 121 NLRB No. 43.

certain other unfair labor practices alleged in the complaint, as set forth in his original Intermediate Report, and recommended dismissal of those allegations. Thereafter, the General Counsel, the Respondent Company, and the Respondent Union filed exceptions to the Supplemental Intermediate Report and supporting briefs.

Pursuant to the provisions of Section 3 (b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel.

The Board has considered the Intermediate Report, and the Supplemental Intermediate Report, copies of which are attached hereto, the exceptions and briefs, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner in his Intermediate Report as modified by the Supplemental Intermediate Report, subject to the following additions and modifications:

1. In the original Intermediate Report, the Trial Examiner found that the Company violated Section 8 (a) (3) and (1) of the Act by conditioning the employment of Abolins, Crowe, Garnes, Bleeck, and Wyman upon their joining the Union and obtaining clearance from it. The Company did not except to these findings, and we adopt them.

2. In his Supplemental Intermediate Report the Trial Examiner found that the Company and the Union participated in an arrangement that required applicants for jobs as laborers to obtain, as a condition of employment, dispatch slips from the Union,

which were issued only after application had been made for membership therein.

We find, contrary to the contention of the Respondents,[2] that the record amply supports this finding, at least with respect to hirings by the Company at Anchorage, Alaska, in connection with work done under the Company's cost plus contract with Western Electric Company. Accordingly, we find that, by maintaining with respect to such hirings a practice of conditioning employment on membership in, and clearance by, the Union, the Company violated Section 8 (a) (3) and (1) of the Act and the Union violated Section 8 (b) (2) and (1) (A) of the Act.[3]

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[2] The Union contends that there is no direct evidence that the unlawful practice found herein was anything but unilateral action on the part of the company. However, we believe the evidence set forth in our Decision and Order Remanding Case and in the Supplemental Intermediate Report sufficiently establishes union participation in an unlawful practice whereby any hirings of laborers by the Company at Anchorage under the Western Electric contract were limited to union members approved by the Union. While the Company was permitted to request a limited number of individuals by name, they were not hired unless they were approved by the Union as members in good standing.

The Company contends, in effect, that the purpose of its requirement of union clearance was merely to eliminate unqualified applicants and to give notice to the Union of the identity of those hired. However, it is clear, as we have found, that employment was conditioned not only on union clearance but also on union membership. Accordingly, we find no merit in this contention.

[3] The General Counsel excepts to the failure of the Trial Examiner to find that the Company un-

The Remedy

In the Supplemental Intermediate Report the Trial Examiner recommended that the Respondents jointly reimburse Abolins, Crowe, Garnes, Wyman and Bleeck for all initiation fees and dues paid by them. The General Counsel excepts to the Trial Examiner's failure to recommend joint reimbursement of initiation fees and dues paid by all members of the Union employed pursuant to the illegal hiring arrangement found herein. We find merit in this exception. By the aforesaid unlawful hiring arrangement, the Respondents have unlawfully coerced employees to join the Union in order to obtain employment, thereby inevitably coercing them into the payment of initiation fees, Union dues, and other sums. In order adequately to remedy the unfair labor practices found, the Respondents should be required to reimburse employees of the Company for any initiation fees or dues, and other moneys, which have been unlawfully exacted from them as the price of their employment. Therefore, as part of the remedy we shall order the Respondents, jointly and severally, to refund to the employees of the Company hired at Anchorage, Alaska, for work under the Western Electric contract mentioned

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lawfully gave preference in hire to union members over 26 local applicants at the Big Mountain project. However, the record shows only that these 26 were not hired until several months after they applied. We find insufficient basis in the record for holding that the hiring of these 26 was delayed because of their lack of membership in the Union, rather than for the economic reasons testified to by the Company.

above, all initiation fees, dues, and other moneys paid by them to the Union as the price of their employment. We believe that these remedial provisions are appropriate and necessary in order to expunge the coercive effect of the Respondents' unfair labor practices.[4] The liability of each Respondent for reimbursement shall begin 6 months prior to the date of the filing and service of the charge against it, and shall extend to all such moneys thereafter collected.[5]

The unfair labor practices found herein demonstrate on the part of the Respondents such a fundamental antipathy to the objectives of the Act as to compel an inference that the commission of other unfair labor practices may be anticipated in the future. By conditioning employment on membership in, and clearance by, the Union, the Respondents have resorted to the most effective means at their disposal to defeat what the Supreme Court has termed the "principal purpose of the Act," namely, its guarantee to employees of "full freedom

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[4] Tellepsen Construction Co., 122 NLRB No. 78; Los Angeles-Seattle Motor Express, Inc., 121 NLRB No. 205; Broderick Wood Products Company, 118 NLRB 38, enf'd 43 LRRM 2123 (C. A. 10, 1958); Brown-Olds Plumbing & Heating Corporation, 115 NLRB 594; Coast Aluminum Company, 120 NLRB No. 173.

[5] As the Trial Examiner originally dismissed the complaint insofar as it alleged that the Respondent Union's conduct violated the Act, we shall exempt the period between the date of the original Intermediate Report and the date of the Supplemental Intermediate Report herein.

of association and self-organization." Wallace Corp. v. N.L.R.B. 323 U.S. 248. Accordingly, it will be recommended that Respondents be ordered to cease and desist from in any manner interfering with, restraining, or coercing, employees in the exercise of the rights guaranted by the Act.[6]

Order

Upon the entire record in this case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that:

A. The Respondent, Morrison-Knudsen Company, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining, or otherwise giving effect to any understanding, arrangement, or practice with International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, or any other labor organization, whereby applicants for employment must join such labor organization and obtain clearance or dispatch slips from it as a condition of employment with Morrison-Knudsen, except in accordance with Section 8 (a) (3) of the Act;

(b) In any other manner encouraging member-

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[6] The Trial Examiner recommended only a proscription of interference, etc., in any manner related to the unfair labor practices found herein. The Company excepted to such proscription as too broad. We find no merit in this exception. See North East Texas Motor Lines, Inc., 109 NLRB 1148, 1150.

ship in Local 341, or in any other labor organization, or otherwise interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Jointly and severally with Local 341, refund to all its present and former employees hired at Anchorage, Alaska, for work under its cost plus contract with Western Electric Company, Incorporated, all initiation fees, dues, and other moneys paid as a condition of membership in Local 341 in the manner and to the extent set forth in the section hereof entitled "The Remedy";

(b) Post in conspicuous places at its principal offices in Anchorage, Alaska, and at all its job sites within the jurisdiction of Local 341, including places where notices to its employees are customarily posted, copies of the notice attached hereto and marked Appendix A.[7] Copies of said notice, to be furnished by the Regional Director of the Nineteenth Region of the Board, shall, after being signed by its duly authorized representative, be posted by Morrison-Knudsen immediately upon receipt thereof

[7] If this Order is enforced by a decree of the United States Court of Appeals, this notice shall be amended by substituting for the words "Pursuant To A Decision and Order," the words "Pursuant To A Decree of the United States Court of Appeals, Enforcing An Order."

and maintained by it for 60 consecutive days thereafter. Reasonable steps shall be taken by Morrison-Knudsen to insure that said notices are not altered, defaced or covered by any other material.

(c) Post at the same places and under the same conditions as set forth in (b) above, and as soon as they are forwarded by the Regional Director, copies of the Respondent Union's Notice herein, marked Appendix "B."

(d) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Decision and Order what steps it has taken to comply herewith.

B. The Respondent, International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining, or otherwise giving effect to, any understanding, arrangement, or practice, with Morrison-Knudsen, or with any other employer, whereby applicants for employment must become members of, and obtain clearance or dispatch slips from, Local 341 as a condition of employment with Morrison-Knudsen, except in accordance with Section 8 (a) (3) of the Act;

(b) Causing or attempting to cause Morrison-Knudsen, or any other employer, to discriminate against employees or applicants for employment in violation of Section 8 (a) (3) of the Act;

(c) In any other manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act.

(a) Jointly and severally with Morrison-Knudsen refund to all present and former employees of Morrison-Knudsen hired by it at Anchorage, Alaska, under its cost-plus contract with Western Electric Company, Incorporated, all initiation fees and other moneys paid as a condition of membership in Local 341 in the manner and to the extent set forth in the section hereof entitled "The Remedy";

(b) Post at its offices in Anchorage, Alaska, and at all job sites of Morrison-Knudsen within the jurisdiction of Local 341 copies of the notice attached hereto and marked "Appendix B."[8] Copies of said notice, to be furnished by the Regional Director for the Nineteenth Region, shall, after being duly signed by its duly authorized representative, be posted by Local 341 immediately upon the receipt thereof, and maintained by it for sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Local 341 to insure that such notices are not altered, defaced, or covered by any other material;

[8] See preceding fn.

(c) Mail to the Regional Director for the Nineteenth Region signed copies of the notice for posting, at all job sites of Morrison-Knudsen within Local 341's territorial jurisdiction, as provided above herein. Copies of said notice, to be furnished to Local 341 by said Regional Director, shall, after being signed by Local 341's representative, be forthwith returned to the Regional Director for disposition by him.

(d) Notify the aforesaid Regional Director, in writing, within 10 days from the date of this Order, what steps it has taken to comply herewith.

Dated, Washington, D. C., January 29, 1959.

BOYD LEEDOM, Chairman,
STEPHEN S. BEAN, Member,
JOHN S. FANNING, Member.
[Seal] National Labor Relations Board.

APPENDIX A

Notice To All Employees and All Applicants For Employment Pursuant To A Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify our employees and applicants for employment that:

We Will Not maintain, or otherwise give effect to, any understanding, arrangement, or practice, with International Hod Carriers, Building, and

Common Laborers Union of America, Local 341, AFL-CIO, or any other labor organization, whereby applicants for employment are required to join such labor organization, and obtain clearance by it, in order to obtain employment with us, except in accordance with Section 8 (a) (3) of the Act.

We Will Not, in any other manner, encourage membership in any labor organization or otherwise interfere with, restrain, or coerce, employees or applicants for employment in the exercise of their right to self-organization, to form, join or assist any labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection and to refrain from any or all such activities, except to the extent that such right might be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

We Will reimburse all employees hired by us at Anchorage, Alaska, for work under our cost-plus contract with Western Electric Company, Incorporated, for all initiation fees, dues or other moneys paid by them to Local 341 at any time after April 25, 1956, as a condition of membership.

All our employees and applicants for employment are free to become or remain members of the above-named union or any other labor organization, except to the extent that this right may be affected by

an agreement in conformity with Section 8 (a) (3) of the amended Act.

MORRISON-KNUDSEN
COMPANY, INC.,
(Employer.)

Dated .....

By .....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX B

Notice To All Members, and To Employees of and Applicants For Employment With Morrison-Knudsen Company, Inc., Pursuant To A Decision and Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

We Will Not maintain, or otherwise give effect to, any understanding, arrangement, or practice, with Morrison-Knudsen Company, Inc., or any other employer, whereby applicants for employment must become members of the undersigned local union and obtain work clearance or dispatch slips from such local union as a condition of employment, except in accordance with Section 8 (a) (3) of the Act.

We Will Not cause or attempt to cause Morrison-Knudsen Company, Inc., or any other employer, to

discriminate against employees or applicants for employment.

We Will Not in any other manner restrain or coerce employees or prospective employees of Morrison-Knudsen Company, Inc., or any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, except in a manner permitted by Section 8 (a) (3) of the Act.

We Will return to all employees of Morrison-Knudsen Company, Inc., who were hired at Anchorage, Alaska, for work under its cost-plus contract with Western Electric Company, Incorporated, all initiation fees, dues and other moneys paid us by them at any time after April 12, 1956, as a condition of membership.

International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO,

(Labor Organization.)

Dated .....

By .....

(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

United States Court of Appeals
For The Ninth Circuit

No. 16383

MORRISON-KNUDSEN COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 16401

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 341, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.92, Rules and Regulations of the National Labor Relations Board—Series 7, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, known as Case Nos. 19-CA-1405 and 19-CB-450, such transcript includes the pleadings and testimony and evidence upon which

the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic Transcript of testimony taken before Trial Examiner Howard Myers on September 9, 10, 11, 12, 13, and October 31, 1957, together with all exhibits introduced into evidence.

(2) Copy of Trial Examiner Myers' Intermediate Report and Recommended Order dated January 20, 1958.

(3) Copy of General Counsel's exceptions to the Intermediate Report and Recommended Order received February 12, 1958.

(4) Copy of petitioner's[1] Morrison-Knudsen Company, Inc., (hereinafter called Company) exceptions to Intermediate Report and Recommended Order received February 12, 1958.

(5) Copy of Decision and Order remanding case to the Trial Examiner, issued by the National Labor Relations Board on July 31, 1958. (Marked Trial Examiner's Exhibit No. 1, received in evidence on page 1, footnote 1 of Supplemental Intermediate Report and Recommended Order and contained in Volume I hereof.)

(6) Copy of Trial Examiner's telegram dated August 22, 1958 notifying all parties the hearing is reopened and will resume on September 8, 1958 in Anchorage, Alaska. (Marked Trial Examiner's Ex-

[1] Respondent Company before the Board.

hibit No. 2, received in evidence on page 2, footnote 2 of Supplemental Intermediate Report and Recommended Order and contained in Volume I hereof.)

(7) Copy of Petitioner,[2] International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, (hereinafter called Union) telegram, dated September 5, 1958, advising Union rests and requests that supplemental intermediate report be based on evidence presently in record. (Marked Trial Examiner's Exhibit No. 3, received in evidence on page 2, footnote 3 of Supplemental Intermediate Report and Recommended Order and contained in Volume I hereof.)

(8) Copy of Trial Examiner's telegram dated September 5, 1958 notifying all parties that the notice of resumption of hearing given August 22, 1958 is cancelled and hearing closed. (Marked Trial Examiner's Exhibit No. 4, received in evidence on page 2, footnote 4 of Supplemental Intermediate Report and Recommended Order and contained in Volume I hereof.)

(9) Copy of Trial Examiner Myer's Supplemental Intermediate Report and Recommended Order issued on September 26, 1958.

(10) Copy of General Counsel's exceptions to Supplemental Intermediate Report and Recommended Order received October 17, 1958.

(11) Copy of Union's exceptions to the Supplemental Intermediate Report and Recommended Order, received November 3, 1958.

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[2] Respondent Union before the Board.

(12) Copy of Company's exceptions to the Supplemental Intermediate Report and Recommended Order received November 10, 1958.

(13) Copy of Supplemental Decision and Order issued by the National Labor Relations Board on January 29, 1959.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the Seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 10th day of April, 1959.

[Seal] /s/ FRANK M. KLEILER,
Executive Secretary.

[Endorsed]: United States Court of Appeals For The Ninth Circuit. No. 16383. Morrison-Knudsen Company, Inc., Petitioner, vs. National Labor Relations Board, Respondent. No. 16401. International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, Petitioner, vs. National Labor Relations Board, Respondent. Transcript of Record. Petitions For Review and Petitions to Enforce Order of the National Labor Relations Board.

Filed: April 17, 1959.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 16383

MORRISON-KNUDSEN COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Comes Now the above named Petitioner and, in support of this, its Petition to Review the Decision and Order of the National Labor Relations Board, entered and dated January 29, 1959, in Case No. 19-CA-1405, and pursuant to the provisions of 29 U. S. C. Section 160 (f), respectfully shows unto the above entitled court:

I.

Nature of Proceedings

This is a Petition to Review the Decision and Order of the National Labor Relations Board, entered January 29, 1959, in National Labor Relations Board Case No. 19-CA-1405 (122 NLRB 136) against the above named Petitioner, a copy of which Decision and Order is attached hereto and designated Exhibit A. The said Decision and Order found that the Petitioner had engaged in and was

engaging in unfair labor practices in violation of Sections 8 (a) (1) and 8 (a) (3) of the National Labor Relations Act, and ordered Petitioner to cease and desist from certain conduct described therein and take certain described affirmative action. The said Decision and Order is a final order of the Board in this proceeding.

II.

Venue

The events out of which this proceeding arose all occurred in Alaska. The original Complaint was issued from the office of the Nineteenth Regional of the National Labor Relations Board located in Seattle, Washington, and hearings before the Trial Examiner for the Board were held in Alaska and in Seattle, Washington. The location of the construction work and general operations of Petitioner here involved is in Alaska.

III.

Grounds of Relief

The Petitioner seeks the relief prayed for herein on the following grounds:

1. That the factual findings and conclusions of the Board's Decision and Order are not supported by substantial evidence on the record considered as a whole.

2. That the Trial Examiner committed errors of law in the conduct of the hearing which were excepted to at the time.

3. That the conclusions of law contained in the Decision of the Board are not as a matter of law

supportable by the record or by the facts even as found by the Board.

4. That the alleged conduct, even if found to violate the National Labor Relations Act, is nevertheless insufficient to support the broad scope of the Board's Order.

5. That the Board's Order sets forth remedies inappropriate to the conduct found to be in violation of the Act, and are beyond the legal authority of the Board.

6. That the Board's Order does not state with reasonable specificity the acts or conduct which the Petitioner is to do or to refrain from doing.

IV.

Relief Prayed

The Petitioner seeks relief herein as follows:

1. That the Court enter a decree herein setting aside, reversing or denying enforcement to all of the Board's Decision and Order applicable to Petitioner.

2. That in the event the prayer of Section 1 of this paragraph is not granted, that the Court modify the Decision and Order of the Board as follows:

(a) By striking from paragraph 1 (a) of said Order all of the text thereof except so much as requires Petitioner to cease and desist from requiring membership in a labor organization as a condition of employment, except in accordance with Section 8 (a) (3) of the Act.

(b) By striking paragraph 1 (b) from said Order.

(c) By striking paragraph 2 (a) from said Order.

(d) By striking paragraphs 2 (b) and (c) from said Order.

3. That in the event paragraphs 1 and 2 (c) of this prayer are denied, by modifying paragraph 2 (a) of the Order to provide for reimbursement only to Morris A. Abolins, Ronald S. Crowe, Joel I. Garnes, William A. Wyman and Robert Bleeck.

4. That in the event the prayer of Sections 1, 2 (c) and 3 of this paragraph are denied, by modifying paragraph 2 (a) of the Order by limiting reimbursement only to those persons establishing proof that they were required to join Local 341 during the period involved as a condition of employment with Morrison-Knudsen Company, Inc.

Dated this 27th day of February, 1959.

MORRISON-KNUDSEN
COMPANY, INC.,
/s/ By R. R. SNOW,
An Authorized Official.

ALLEN, DeGARMO & LEEDY,
/s/ By GERALD DeGARMO,
/s/ SETH W. MORRISON,
Attorneys for Petitioner.

Duly Verified.

[Endorsed]: Filed February 28, 1959. Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

No. 16401

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 341, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW OF DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Comes Now the above named Petitioner and, in support of this, its Petition to Review the Decision and Order of the National Labor Relations Board, entered and dated January 29, 1959, in Case No. 19-CB-450, and pursuant to the provisions of 29 U.S.C. Section 160 (f) respectfully shows unto the above entitled Court:

I.
Nature of Proceedings

This is a Petition to Review the Decision and Order of the National Labor Relations Board, entered January 29, 1959, in National Labor Relations Board Case No. 19-CB-450 (122 NLRB 136) against the above named Petitioner, a copy of which Decision and Order is attached hereto and designated

(b) By striking paragraph B 1 (b) from said Order.

(c) By striking paragraph B 1 (c) from said Order.

3. That in the event paragraphs 1 and 2 (c) of this prayer are denied, by modifying paragraph 2 (a) of the Order to provide for reimbursement only to Morris A. Abolins, Ronald S. Crowe, Joel I. Garnes, William A. Wyman and Robert Bleeck.

4. That in the event the prayer of Sections 1, 2 (c) and 3 of this paragraph are denied, by modifying paragraph B 2 (a) of the Order by limiting reimbursement only to those persons establishing proof that they were required to join Local 341 during the period involved as a condition of employment with Morrison-Knudson Company, Inc.

Dated this 12th day of March, 1959.

International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO.

/s/ By H. F. GROOTHUIS,
An Authorized Official.

HARTLIEB, GROH & RADER,
/s/ By GORDON W. HARTLIEB,
Attorneys for Petitioner.

Duly Verified.

[Endorsed]: Filed March 16, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause No. 16401.]

STATEMENT OF POINTS ON PETITION FOR REVIEW

Comes Now the above named petitioner, and submits the following statement of points on their Petition to Review the Decision and Order of the National Labor Relations Board in this cause, entered and dated October 17, 1958:

1. That the factual findings and conclusion of the Board Decision, including the adopted Intermediate Report of the Trial Examiner, are not supported by substantial evidence on the record considered as a whole.

2. That the Trial Examiner committed errors of law in the conduct of the hearing which were excepted to at the time.

3. That the conclusions of law contained in the Decision of the Board, including the adopted Intermediate Report and conclusion of the Trial Examiner, are not as a matter of law supportable by the record or by the facts even as found by the Board and the Trial Examiner.

4. That the alleged conduct, even if found to violate the National Labor Relations Act, is nevertheless insufficient to support the broad scope of the Board's remedial Order.

5. That the Board's Order sets forth remedies inappropriate to the conduct found to be in violation of the Act.

6. That the Board's Order does not state with reasonable specificity the acts which the petitioners are to do or are to refrain from doing.

Dated this 12th day of March, 1959.

HARTLIEB, GROH AND RADER,
/s/ By GORDON W. HARTLIEB,
Attorneys for the Petitioner.

[Endorsed]: Filed March 16, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause No. 16,383.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW ITS ORDER AND REQUEST FOR ENFORCEMENT OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Boards, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Secs. 151 et seq), files this answer to the petition to review an order issued against Morrison-Knudsen Company, Inc., petitioner herein, and the Board's request for enforcement of said order.

1. The Board admits the allegations contained in paragraph 1 of the petition to review.

2. With respect to the allegations contained in paragraph II of the petition to review, the Board prays reference to the certified transcript of the record, filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings evidence, findings of fact, conclusions

of law, and order of the Board, and all other proceedings had in this matter.

3. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper under the Act, respectfully requests this Honorable Court for enforcement of its order issued against petitioner on January 29, 1959, in the consolidated proceeding designated on the record of the Board as Case Nos. 19-CA-1405, 19-CB-450 initiated by charges filed by Denton R. Moore against Morrison Knudsen Company, Inc., and International Hod Carriers Building and Common Laborers Union of America, Local 341, AFL-CIO.

4. Pursuant to Sections 10(e) and (f) of the Act, and Rule 34 (7) (a) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board upon which the said order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law, and the order of the Board sought to be enforced.

Wherefore the Board prays that this Honorable Court cause notice of the filing of this answer to the petition to review and request for enforcement to be served upon petitioner, and that this Court make and enter a decree denying the amended petition to review and enforcing the Board's order in full.

Dated at Washington, D. C. this 10th day of April, 1959.

/s/ THOMAS J. McDERMOTT,
Associate General Counsel.

[Endorsed]: Filed April 13, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause No. 16,401.]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW ITS ORDER AND REQUEST FOR ENFORCEMENT OF SAID ORDER

To the Honorable, the Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 et seq), files this answer to the petition to review an order issued against International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, petitioner herein, and the Board's request for enforcement of said order.

1. The Board admits the allegations contained in paragraph I of the petition to review.

2. With respect to the allegations contained in paragraph II of the petition to review, the Board prays reference to the certified transcript of the record, filed herewith, of the proceedings heretofore had herein, for a full and exact statement of the pleadings, evidence, findings of fact, conclusions of

law, and order of the Board, and all other proceedings had in this matter.

3. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper under the Act, respectfully requests this Honorable Court for enforcement of its order issued against petitioner on January 29, 1959, in the consolidated proceeding designated on the record of the Board as Case Nos. 19-CA-1405, 19-CB-450 initiated by charges filed by Denton R. Moore against Morrison-Knudsen Company, Inc., and International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO.

4. Pursuant to Sections 10(e) and (f) of the Act, and Rule 34 (7) (a) of this Court, the Board is certifying and filing with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board upon which the said order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusion of law, and the order of the Board sought to be enforced.

Wherefore the Board prays that this Honorable Court cause notice of the filing of this answer to the petition to review and request for enforcement to be served upon petitioner, and that this Court make and enter a decree denying the amended petition to review and enforcing the Board's order in full.

Dated at Washington, D.C. this 10th day of April, 1959.

/s/ THOMAS J. McDERMOTT,
Associate General Counsel.

[Endorsed]: Filed April 13, 1959. Paul P. O'Brien, Clerk.

United States Court of Appeals
For the Ninth Circuit

No. 16383

MORRISON-KNUDSEN COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 16401

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA LOCAL 341, AFL-CIO,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

MOTION OF THE NATIONAL LABOR RELATIONS BOARD FOR CONSOLIDATION OF CAUSES AND PERMITTING ARGUMENT AND CONSOLIDATED BRIEF

To the Honorable, The Judges of the United States Court of Appeals for the Ninth Circuit:

The National Labor Relations Board moves the

Court to consolidate the above-captioned causes.

In support thereof, the Board respectfully shows:

(1) The two above-captioned causes arise out of a single consolidated proceeding before the National Labor Relations Board known as case Nos. 19-CA-1405 and 19-CB-450.

(2) The facts involved in the two cases are identical. Only one Decision and Order has been entered after consideration of a single record before the Board. In No. 16383, Morrison-Knudsen Company, Inc., party to the proceeding before the Board, seek review of that part of the Board's order which pertains to it and the Board in that proceeding has cross-petitioned for enforcement of its order against that petitioner.

(3) In No. 16401 the International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, seeks review of that portion of the Board's order which pertains to it and the Board in that proceeding has cross-petitioned for enforcement of its order against that petitioner.

(4) Consolidation of the causes would conserve the Court's time as well as that of the parties, would avoid confusion as to the issues, would materially reduce the printing expenses, and would otherwise serve the convenience of the Court.

In event that the Court grants this Motion for consolidation of causes, the Board moves this Court for permission to file a single brief sixty (60) days from the receipt of the printed record.

In support thereof the Board respectfully shows:

(1) The Board feels that in event this matter is consolidated, involving a single Decision and Order

before the Board, one brief will serve to represent its position before the Court with regard to the opposing parties concerned. The parties and issues involved in both causes are so closely identified with each other that it would be almost impossible to argue the Board's position against the party in one case without including the argument to be used against the party in the other case. Thus a single brief will eliminate, to the convenience of the Court and all parties thereto, the repetition and duplication that otherwise cannot be avoided if the Board files individual briefs for each cause.

(2) In each cause, in which the Board is respondent, petitioners' briefs are due thirty (30) days after mailing of the printed record, and the Board's brief is due thirty (30) days after receipt of petitioners' brief or sixty (60) days after the mailing of the printed record. Accordingly, the Board requests that it be permitted to file a single brief sixty (60) days after the receipt of the printed record. This would not jeopardize or prejudice any of the rights of the parties involved herein.

Wherefore, the Board respectfully requests that this Court grant this motion consolidating these cases, for purposes of the record, briefs, and oral argument.

Dated at Washington, D. C. this 10th day of April, 1959.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National
Labor Relations Board.

So Ordered.

/s/ WALTER L. POPE,
/s/ JAMES ALGER FEE,
/s/ FREDERICK G. HAMLEY,
Circuit Judges.

[Endorsed]: Filed April 13, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Causes.]

STATEMENT OF POINTS BY PETITIONER, MORRISON-KNUDSEN COMPANY, INC., ON PETITION FOR REVIEW

Comes Now the above named petitioner, Morrison-Knudsen Company, Inc., and submits the following statement of points on its petition to review the decision and order of the National Labor Relations Board in this cause, entered and dated January 29, 1959:

1. That the factual findings and conclusions of the Board's Decision and Order are not supported by substantial evidence on the record considered as a whole.

2. That the Trial Examiner committed errors of law in the conduct of the hearing which were excepted to at the time.

3. That the Conclusions of Law contained in the Decision of the Board are not as a matter of law supportable by the record or by the facts even as found by the Board.

4. That the alleged conduct, even if found to

violate the National Labor Relations Act, is nevertheless insufficient to support the broad scope of the Board's Order.

5. That the Board's Order sets forth remedies inappropriate to the conduct found to be in violation of the Act, and are beyond the legal authority of the Board.

6. That the Board's Order does not state with reasonable certainty the acts or conduct which the petitioner is to do or to refrain from doing.

Dated this 29th day of April, 1959.

ALLEN, DeGARMO & LEEDY,
/s/ By SETH W. MORRISON,
Attorneys for petitioner, Morrison-Knudsen Company, Inc.

[Endorsed]: Filed April 30, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Causes.]

STIPULATION

The Undersigned, attorneys of record of the above named parties, do hereby stipulate that the last sentence on page 5 of petitioner's (Morrison-Knudsen Company, Inc.) Petition for Review of Decision and Order of the National Labor Relations Board, which line now reads:

"1, 2 (b) and 3 of this paragraph are denied, by" shall be amended to refer to section 2 (c) rather than to (b), and that the line shall read:

"1, 2 (c) and 3 of this paragraph are denied, by"; and

It Is Further Stipulated that General Counsel's exhibit No. 5, consisting of the AGC-AFL Alaska Master Labor Agreement, being a printed booklet of approximately 30 pages, may be considered as an exhibit and a part of the record before the court without the necessity of including this exhibit in the printed record, provided the above entitled court so approves.

Dated this 29th day of April, 1959.

ALLEN, DeGARMO & LEEDY,
/s/ By SETH W. MORRISON,
Attorneys for petitioner, Morrison-Knudsen Company, Inc.

HARTLIEB, GROH AND RADER,
/s/ By GORDON H. HARTLIEB,
Attorneys for petitioner, International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO.

OFFICE OF THE GENERAL COUNSEL OF THE NATIONAL LABOR RELATIONS BOARD,
/s/ By MARCEL MALLET-PREVOST,
Assistant General Counsel.

[Endorsed]: Filed May 7, 1959. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Nineteenth Region

Case No. 19-CA-1405

In the Matter of: Morrison-Knudsen, Inc., and Denton R. Moore, an individual.

Case No. 19-CB-405

International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, and Denton R. Moore, an individual.

TRANSCRIPT OF PROCEEDINGS

Loussac Library, 5th and "F" Street, Anchorage, Alaska, Monday, September 9, 1957.

Pursuant to notice, the above-entitled matter came on for hearing at 10 o'clock, a.m.

Before: Howard Myers, Trial Examiner.

Appearances: Charles Y. Latimer, 407 United States Courthouse, Seattle, Washington, Counsel for General Counsel.

Seth W. Morrison, of the firm of Allen, DeGarmo and Leedy, 1308 Northern Life Tower, Seattle, Washington, appearing on behalf of Morrison-Knudsen, Inc. Gordon W. Hartlieb, Box 2068, Anchorage, Alaska, appearing on behalf of Local 341. [2]*

Proceedings

Trial Examiner: I would like to announce that

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

this is a formal hearing before the National Labor Relations Board in the matter of Morrison-Knudsen Company, Inc., and Denton R. Moore, an individual, and International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL-CIO, and Denton R. Moore, an individual, being Cases Nos. 19-CA-1405 and 19-CB-405.

The Trial Examiner appearing for the National Labor Relations Board is Howard Myers.

Will counsel and any other representatives of the parties kindly state their appearances for the record?

Mr. Latimer: For General Counsel, Charles Y. Latimer, 407 United States Courthouse, Seattle, Washington.

Mr. Hartlieb: Gordon W. Hartlieb, Box 2068, Anchorage, Alaska, for Local 341.

Mr. Morrison: For Morrison-Knudsen Company, Seth W. Morrison of Allen, DeGarmo and Leedy, 1308 Northern Life Tower, Seattle, Washington.

Trial Examiner: Does anybody else wish to have his appearance noted?

(No response.)

Trial Examiner: Will the reporter kindly note for the record that I heard no response to my inquiry?

I would like to announce further that the official reporter [4] makes the only official transcript of these proceedings. The Board will not certify any other transcript other than the official transcript for any court use. It may become necessary during the hearing to make corrections in the record. If so, the

parties will submit the suggestion to corrections to the other parties and when they have received their approval, it will be submitted to the Trial Examiner. In the event the parties are unable to agree upon the proposed corrections, the Trial Examiner will then entertain a motion to correct the record.

The Trial Examiner will allow automatic exceptions to all adverse rulings.

During the course of the hearing the Trial Examiner may ask questions of the various witnesses. The Trial Examiner wants counsel to feel free to object to any of his questions if they think the questions are improper with the same freedom as if the questions were propounded by counsel.

You may proceed.

Mr. Latimer: I will ask the reporter to mark for identification the formal papers as follows:

1-A is the charge in Case 19-CB-405, filed September 9, 1957.

1-B is the affidavit of service of charge in Case 19-CB-450 sworn to October 10, 1956.

1-C is the charge in Case 19-CA-1405, filed on September [5] 9, 1956.

1-D is the affidavit of service of charge in Case 19-CA-1405 sworn to on October 10, 1956.

1-E, consolidated complaint in both cases signed by Patrick H. Walker, acting regional director, and dated August 2, 1957.

1-F is the affidavit of service of complaint of consolidated complaint and order consolidated cases and notice of hearing sworn to on August 2, 1957 in both cases.

1-G, a motion to change place and date of hearing filed by Gordon W. Hartlieb, attorney by the union.

1-H is the answer filed by the union.

1-I is the amended answer filed by the union.

1-J is the motion and application for continuance of the hearing and affidavit in support thereof filed by the company.

1-K is answer of Morrison-Knudsen Company, Inc.

1-L, order rescheduling hearing dated August 16, 1957.

1-M is affidavit of service of order rescheduling hearing and order changing place of hearing sworn to on August 16, 1957.

Counsel has examined the formal papers and I offer them in evidence.

(Thereupon the documents above referred to were marked General Counsel's Exhibits Nos. 1-A through 1-M for identification.)

Trial Examiner: Any objection, gentlemen? [6]

Mr. Hartlieb: No objection.

Trial Examiner: There being no objections, the papers are received and I will ask the reporter to kindly mark them as General Counsel's Exhibits 1-A through and including 1-M.

(The documents heretofore marked General Counsel's Exhibits Nos. 1-A through 1-M for identification were received in evidence.)

Mr. Morrison: May I inquire? 1-H is the answer of the union, 1-I is the amended answer of the union?

Mr. Latimer: Right.

Mr. Morrison: J is the motion by Morrison-Knudsen, K is the answer of Morrison-Knudsen?

Mr. Latimer: Right.

Mr. Morrison: L is the order rescheduling hearing?

Mr. Latimer: Right.

Mr. Morrison: And M is affidavit of service and order?

Mr. Latimer: Right.

I would like to call Mr. Wargny as my first witness.

Trial Examiner: Will you kindly step forward, sir, and be sworn.

RAOUL WARGNY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Raoul Wargny.

Trial Examiner: Where do you live? [7]

The Witness: 7323 Woodlawn Avenue, Seattle, Washington.

Trial Examiner: You may be seated, sir.

You may proceed with the examination of the witness who has been duly sworn.

Direct Examination

Q. (By Mr. Latimer): Mr. Wargny, did you ever work for Morrison-Knudsen Company?

A. I did.

Q. When did you start working for them?

(Testimony of Raoul Wargny.)

A. March 3, 1956.

Q. What was your job?

A. Personnel manager.

Q. Where was your office located?

A. Pomery Building on Post Road, Anchorage.

Q. What were your duties as personnel manager?

A. To hire various crafts for construction work at various sites conducted by Morrison-Knudsen.

Q. Did there come a time when you employed common laborers for any of Morrison-Knudsen sites? A. Yes.

Q. Did you have an occasion to employ common laborers for the Big Mountain site? A. Yes.

Q. That is known as Site No. 2, is it not?

A. That's right. [8]

Q. How did you receive orders for laborers for Site No. 2?

A. The site superintendent would radio the personnel or the personnel department for various types of crafts and we would receive it and then call up the unions and tell them the men that we wanted.

Q. In the case of common laborers, what union would you call? A. Local 341.

Q. What would happen after that?

A. They would be dispatched by the union with an original and duplicate dispatch slip and they would come to our personnel office for processing.

Q. Now, did you have an occasion to receive re-

(Testimony of Raoul Wargny.)

quests from the site superintendents for named personnel? A. Yes.

Q. What would you do in a case of that sort?

A. We would call up the union and ask them, if we could, if the man was in good standing and he was eligible to be dispatched for hiring.

Q. What would happen after that?

A. If the union would O. K. it, they would dispatch him and we would process him and send him out to the site.

Q. What would happen if the union failed to dispatch him?

A. If the union failed to dispatch him, then we would ask for a substitute. [9]

Q. Now, were there occasions when the site superintendent would ask that natives or local residents at the job site be employed?

A. During the term of my employment, I didn't run into that to speak of at all. So I can't speak too authentically on cases, I mean specific cases of that nature.

Q. Was there any agreement with the union as to how many named employees you could request? In other words, let's assume that you would get a request from the site superintendent at Big Mountain for ten laborers and he would name five people who he wanted. What would you do in a case like that?

Mr. Morrison: I object in connection with this man testifying to any agreement with any union until he has first testified as to whether he knew

(Testimony of Raoul Wargny.)

there was an agreement. Secondly, it's a hypothetical question and a portion of the question is too indefinite to ascertain whether it is——

Trial Examiner (interrupting): I think you ought to reframe your question.

Q. (By Mr. Latimer): During your term as employment manager, did there come a time when the site superintendent would ask for, we will say, ten laborers, and named five of those laborers?

Mr. Hartlieb: Your Honor, I object to the form of his question. I think he is leading his witness.

Trial Examiner: Overruled. [10]

A. Yes, sir.

Q. (By Mr. Latimer): What would you do in a case like that?

A. The names that were requested, we would call up Local 341 or the concerned union and tell them we had a requisition for ten men of which five were named requests that we had, that we would like to have go to the job site.

Q. Were there any limitations on the number of named people you could request? A. Yes.

Q. Tell us about that.

A. We were allowed to ask for 50 per cent of the requisition. If there were ten hires or ten names requested, say for laborers, as an instance, we were allowed to request five men.

Q. And if you requested six named men out of ten, what would happen?

A. The circumstances surrounding that would be that, if in an order that we had received we

(Testimony of Raoul Wargny.)

wouldn't request what we were allowed, we would leave it ride or two times later if there were six names instead of five, the fact that we didn't request the full 50 per cent the time previous or the two times previous, and the man was on the bench or he was available for work, they would sometimes allow it.

Q. Do you know of any practice or arrangement whereby the number of natives were limited by the sites where the men are? A. No. [11]

Mr. Morrison: Was your question the number of names or natives?

Mr. Latimer: I beg your pardon.

Mr. Morrison: Would you read back that last question?

(Question read.)

Q. (By Mr. Latimer): Now, who in your office was authorized to contact the locals to request men?

A. Sean Brady, Vernon Bynum, and myself.

Q. Who is Sean Brady?

A. He was my assistant.

Q. Who was Mr. Bynum?

A. My assistant.

Q. While you were personnel manager, were there occasions when some college boys came up here to work? A. Yes, sir.

Q. Do you remember about when that was?

A. I don't remember the exact date but I would say it was around in June, latter part of June.

Q. Immediately following the school year?

A. Upon the completion of the school year.

(Testimony of Raoul Wargny.)

Q. Do you remember when these lads appeared at the personnel office? A. Exact date, no.

Q. You were there at the time?

A. Yes. [12]

Q. Do you remember the occasion when they appeared? A. Yes.

Q. Tell me how those lads were processed, if they were.

Trial Examiner: You say it was sometime in June?

The Witness: The latter part of June to the best of my knowledge.

Q. (By Mr. Latimer): How were they processed?

A. They were processed in the regular way. They were dispatched to the union for a dispatch slip and then they would come to our office and they were processed and sent out to different sites.

Q. Did you talk to any of your supervisors about these five college boys before they came up?

A. No.

Q. Do you know a Mr. Hal Haugen?

A. Yes.

Q. Who is he?

A. I don't know him personally. The only way I have ever had any contact with Mr. Haugen was over the telephone.

Q. Did you have a telephone conversation with him about these college boys? A. Yes.

Q. Was that just before they arrived?

A. Yes.

(Testimony of Raoul Wargny.)

Q. Tell us to your best recollection of that conversation. [13]

Trial Examiner: Who is this man?

Q. (By Mr. Latimer): What is his job?

Trial Examiner: Who was he employed by?

The Witness: Morrison-Knudsen.

Q. (By Mr. Latimer): Did you take any orders from Mr. Haugen?

Mr. Morrison: Let's establish who he is.

Trial Examiner: What was his position with the M-K? Do you know?

Mr. Morrison: Yes, I do, Mr. Examiner.

Mr. Latimer: Can't we stipulate what his position was?

I will call Mr. Erickson.

Mr. Morrison: I won't stipulate to your witness' testimony.

Q. (By Mr. Latimer): Did you take any orders from Mr. Haugen? A. Yes.

Mr. Morrison: I object to this.

Trial Examiner: Take this witness off and bring up Mr. Erickson, please.

(Witness temporarily excused.)

EINAR W. ERICKSON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name?

The Witness: Einar W. Erickson. [14]

Trial Examiner: Where do you live?

The Witness: 1906 Forrer Street, Anchorage.

Trial Examiner: Mr. Latimer, you may proceed.

Direct Examination

Q. (By Mr. Latimer): What is your position with Morrison-Knudsen?

A. District manager.

Q. What was Mr. Haugen's position?

A. District office manager.

Q. Did the personnel manager work under Mr. Haugen? A. He did not.

Q. Did he have any control over the personnel manager? A. He did not.

Q. What were Mr. Haugen's duties?

A. He had absolutely nothing to do with Contract 1787, which is a C.P.F.F. contract. He had nothing to do with it by my personal direction.

Q. What were his duties?

A. He ran the district office of our lump sum work.

Q. Would you explain that?

A. Yes, sir. This Contract 1787 is a contract which we were subcontractor to Western Electric on a cost plus, fixed-fee type of contract.

Q. Is Contract 1787 the Big Mountain contract?

(Testimony of Einar W. Erickson.)

A. It is a part of it. [15]

Q. Go ahead. A. With what?

Q. What was the relationship between your personnel office and Contract 1787?

A. There was no relationship. In the personnel office, Mr. Wargny worked on the cost plus, fixed-fee payroll. That was a separate Morrison-Knudsen contract having no relation whatsoever to the rest of our construction activities. Mr. Haugen, by my direct orders, had nothing whatsoever to do with Contract 1787.

Q. Did he have anything to do with any of your other contracts? A. Yes, sir.

Q. What other contracts?

A. At that time I guess we were building a job at Bethel, a job at King Salmon, a job at Fairbanks, a job in Anchorage, I believe a job at Eileson Air Force Base. We were doing somewhere around fifteen million dollars worth of lump sum contracts.

Q. Where did you get your employees for these various jobs, Bethel, King Salmon?

A. Lump sum work, we hired them out of our Anchorage office.

Q. The spring and summer of 1956?

A. If I may, I will try to answer this by developing the whole thing. Your Contract 1787 being the C.P.F.F. [16]

Q. What is that?

A. Cost plus, fixed-fee. It must be kept entirely separate from your lump sum construction contracts. Both of them were from military agencies in

(Testimony of Einar W. Erickson.)

the end. The only man in the Alaska district, which we call the Alaska district, the only man who had any relationship to both the lump sum construction and the C.P.F.F. was myself as district manager.

Q. How did you get your employees for these various jobs?

A. For which jobs, the lump sum or the C.P.F.F.?

Trial Examiner: All jobs.

A. The C.P.F.F. job had its own employment section. The lump sum jobs, we hired those employees through our lump sum organization.

Q. (By Mr. Latimer): Did you have two personnel offices?

A. No, sir; we did not have a personnel man at that time.

Q. I am speaking about the spring and summer of 1956.

A. Yes, sir, I agree with you. I know what you are speaking of. I said we did not have a personnel manager in the lump sum organization.

Q. How did you get your employees?

A. We had an expediter who got on the telephone and called them.

Q. Was he your personnel manager?

A. No.

Trial Examiner: What was Wargny? [17]

The Witness: Wargny was on Contract 1787 on C.P.F.F.

Trial Examiner: What was his job?

(Testimony of Einar W. Erickson.)

The Witness: Personnel manager on that contract.

Trial Examiner: Did he ever secure employees for any other job?

The Witness: For only Contract 1787.

Q. (By Mr. Latimer): So he would have no contact with the personnel office whatsoever. Mr. Haugen would have no contact with the personnel office, would he?

A. He was under the directions of myself to have nothing to do with Contract 1787.

Q. Did he, do you know?

A. Most of the time.

Mr. Latimer: That's all.

Trial Examiner: Any questions, gentlemen?

Mr. Morrison: No questions at this time.

Trial Examiner: You are excused.

(Witness excused.)

Mr. Latimer: I will call Mr. Wargny back.

RAOUL WARGNY

was recalled and resumed his testimony as follows:

Direct Examination—(Continued)

Q. (By Mr. Latimer): Mr. Wargny, during the spring and summer of 1956, did you have any, did Mr. Haugen give you any instructions at all? [18]

A. Over the telephone.

Q. On about how many occasions, if you can remember? A. Twice.

Q. Now, did he talk to you about these college boys? A. Yes.

(Testimony of Raoul Wargny.)

Q. Tell us about that conversation.

Mr. Morrison: Objection, Mr. Examiner, as to any conversation between Mr. Wargny and Mr. Haugen on the ground and for the reasons in the first place, it is not established as to which category these so-called college men were being employed in. In the second place, it's been established by Mr. Erickson that Mr. Haugen was an office manager and not in charge of company personnel policies, and as such, whatever conversations he might have had with Mr. Wargny are not binding on Morrison-Knudsen because he was not in a position of authority and policy in that particular area.

Trial Examiner: I will take it subject to connection.

Q. (By Mr. Latimer): Go ahead, tell us the conversation.

Trial Examiner: When was the conversation about the college boys?

The Witness: About the end of June.

Mr. Latimer: I think he testified just before they came up here, Mr. Examiner.

Is that correct?

The Witness: Yes. [19]

Trial Examiner: Do you know how soon after this conversation these college boys came here?

The Witness: A day or so later.

Q. (By Mr. Latimer): Give us your best recollection——

Mr. Morrison (interrupting): My objection goes to all questions.

(Testimony of Raoul Wargny.)

Trial Examiner: You have a continuing objection to this whole line on this conversation, which objection is overruled and you have an exception.

Q. (By Mr. Latimer): Give us the best recollection you have of the conversation you had with Mr. Haugen about these five college boys that appeared here in June 1956.

Mr. Hartlieb: Mr. Examiner, I would like to make an objection on that as to respondent union. It is hearsay.

Trial Examiner: I will take it subject to connection.

A. To the best of my recollection, Mr. Haugen called me on the phone and said there were five college boys coming in from Seattle that were coming to work in Alaska for the summer, and that when they came in that arrangements were made that they were to be sent to the union to get dispatch slips to be hired by Morrison-Knudsen and to put them to work, put each individual man on a different site. The men received their dispatch slips and presented them to the personnel office and they were processed and dispatched to five different [20] sites.

Q. (By Mr. Latimer): Were you present when these five college boys arrived? A. Yes.

Q. Did you talk to them? A. Yes.

Q. Did you have anything to do with processing them?

A. No, I just sent them to the girls that did the processing.

Q. Do you know who made the arrangements to

(Testimony of Raoul Wargny.)

have them sent to the union or have the union come to them? A. No, sir.

Mr. Morrison: Your Honor, I am going to object and move all this testimony be stricken, that he is not actually familiar with what occurred to these college men.

Trial Examiner: I will overrule it. I will take it subject to connection.

Q. (By Mr. Latimer): Did you have occasion to employ any employees for any site other than Site No. 2? A. Yes, sir.

Q. What other sites have you employed people for?

A. Every site that was in the Anchorage jurisdiction.

Q. Can you name a few of them?

A. Wasilla, Hinchenbrook, Iliamna, Newenham.

Mr. Morrison: Mr. Examiner, may I have a brief recess [21] here? I want to inquire as to security problems before me get further into this hearing.

Trial Examiner: Very well. We will take a short recess.

(Short recess.)

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Latimer: Yes, sir.

Mr. Hartlieb: The union is ready.

Q. (By Mr. Latimer): Mr. Wargny, did you have occasion to hire anybody for the King Salmon site? That was one of the sites that Mr. Erickson mentioned a moment ago.

(Testimony of Raoul Wargny.)

A. If it was 1787, yes.

Q. Did you hire people only for 1787?

A. Right.

Q. Did you hire anyone for, any laborers, for work in Anchorage? A. Yes.

Q. Did there come a time when you received requests from various site superintendents to have men cleared through the union that they wanted to employ?

Mr. Morrison: I object as leading.

Trial Examiner: Overruled.

A. Yes.

Q. (By Mr. Latimer): Tell us what you would do in a case of that sort.

A. We call the Local 341 here in Anchorage and tell them [22] that we had a radio message from the site superintendent at a certain site and that there was an individual that they had named that they would like to have work for them on that site, and, if he was cleared, or if he was an eligible member of the union.

Q. And if the union failed to clear him, what happened?

A. Then we would radio the site superintendent and say the man was not available because we wasn't cleared.

Q. You mean not available for work?

A. Not available because he wasn't a member of the union or wasn't cleared through the union.

Q. And therefore, wouldn't be put to work, is that correct? A. That's right.

(Testimony of Raoul Wargny.)

Q. Now, if a man was hired away from the job site, say a man was hired at Ilianna for work at Big Mountain, what would happen?

A. I never ran into any occasion of that nature.

Q. Do you know what arrangement the site superintendent had with the job steward as far as clearing employees were concerned?

A. No, sir.

Q. When the union would dispatch an employee, would the union give the employee any papers to bring back to Morrison-Knudsen Company?

A. Yes, sir. [23]

Q. What sort of papers would they give them?

A. A white original and a yellow copy of a dispatch slip.

Mr. Latimer: Will you mark this, please?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

Q. (By Mr. Latimer): I will show you a dispatch slip marked General Counsel's Exhibit 2 and ask you if that is a copy of a dispatch slip that the union gave to the employee when he came to the Morrison-Knudsen personnel office.

A. That's right.

Q. Mr. Wargny, did you have an occasion——

Mr. Morrison (interrupting): Mr. Latimer, just a minute, please. You gave us three exhibits here which we are still examining. Are you going to have these marked for identification?

Mr. Latimer: Yes.

(Testimony of Raoul Wargny.)

Mr. Morrison: Now?

Mr. Latimer: In a couple minutes.

Q. (By Mr. Latimer): Mr. Wargny, did you have an occasion during your term as personnel manager to communicate with prospective employees away from Anchorage, back in the States, for instance?

A. To our representative at Seattle.

Q. I show you what has been marked for identification as General Counsel's Exhibit No. 3—— [24]

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

Q. (By Mr. Latimer—continuing): ——which is a photostatic copy of a telegram to a Mr. Jim and Ben Aldrich and ask you to examine that.

Mr. Hartlieb: Mr. Latimer, is this a copy of what he is looking at?

Mr. Latimer: Yes, sir.

Q. (By Mr. Latimer): Are you familiar with that? A. Yes, sir.

Q. Can you tell me what that is?

A. These are two men that were to be hired on clearance from their——

Mr. Morrison (interrupting): Just a moment. I am going to object. That's not what it is.

Q. (By Mr. Latimer): This is a telegram to Jim and Ben Aldrich with reference to employment at Morrison-Knudsen. Did you receive a reply from that telegram? A. Yes.

(Thereupon the document above referred to

(Testimony of Raoul Wargny.)

was marked General Counsel's Exhibit No. 3-A for identification.)

Q. (By Mr. Latimer): I show you a telegram which has been marked as 3-A, and is that the reply to that telegram? A. Yes. [25]

Q. Did Mr. Jim and Ben Aldrich report here for work? A. Yes.

(Thereupon the document above referred to was marked General Counsel's Exhibit 3-B for identification.)

Q. (By Mr. Latimer): I show you what has been marked for identification as General Counsel's Exhibit 3-B and ask if that is a photostatic copy of the dispatch slips that they presented to you when they reported for work? A. That's right.

Mr. Hartlieb: I object to this line of questioning. I would like to have Mr. Latimer tell us what the relevancy of it is.

Trial Examiner: Do you care to explain?

Mr. Latimer: I would be very happy to, Mr. Examiner. This is merely a link in the chain of practice that was engaged in by the company and the union——

Mr. Hartlieb (interrupting): What union, Mr. Latimer?

Mr. Latimer: Unions.

Mr. Hartlieb: There is only one union named, as I understand, named as the respondent here.

Mr. Latimer: I expect to put into the record a copy of the 1956 agreement between the Associated General Contractors and the various labor organiza-

(Testimony of Raoul Wargny.)

tions here in Alaska. There is nothing wrong with the contract. It is an open shop contract. We think they have been operating closed shop. [26]

Mr. Morrison: I was going to wait until he completed identification as long as he limits his inquiries to identifying material and then I propose an objection to all of these because it does not involve any member, any employee in the labor classification and it does not involve Local 341. And if we're going to get into the situation of trying our relations with every union that these people do business with, we're going to be here for sometime.

Mr. Latimer: It is our theory, Mr. Examiner, that Morrison-Knudsen Company hired practically all of their employees through the various unions. It is true the only union charged here is Local 341. However, the same procedure was carried on with other labor organizations and the telegrams we have just been referring to involve the operating engineers. I am merely trying to show that before these employees were hired they had to be cleared by the union regardless of whether it was the laborers union, engineers, or any other union.

Mr. Morrison: Mr. Examiner, what he is doing is taking one other incident which occurred with another union entirely, the operating engineers, and is going to submit that incident as some proof of what we have done with Local 341. I do not think that is permissible as taking another unrelated act and attempting to, by some process of inference, establish proof of improper conduct with

(Testimony of Raoul Wargny.)

Local 341. I think this hearing issue is confined to what this company relationship with Local [27] 341 was.

Trial Examiner: How are you going to connect it up with Local 341?

Mr. Latimer: I am not going to connect that up with Local 341.

Trial Examiner: What?

Mr. Latimer: Simply the actions of the company.

Trial Examiner: Not any unfair labor practice?

Mr. Latimer: Not as far as 341 is concerned.

Trial Examiner: What about Morrison-Knudsen?

Mr. Latimer: Yes, sir, as far as they're concerned.

Trial Examiner: Under what paragraph of the complaint?

Mr. Latimer: I don't think there is anything in the complaint that refers to that particular phase of it, Mr. Examiner.

Trial Examiner: How could they be advised as to how to proceed, how to defend themselves? They are not informed as to what your charges are.

Mr. Latimer: I will withdraw the question.

Mr. Morrison: And the exhibits.

Mr. Latimer: I haven't offered the exhibits.

I might as well, also, Mr. Examiner, withdraw the identification of the exhibits and save that identification for the next exhibit.

Trial Examiner: Well, these papers won't go to the [28] Board anyway. The Board won't see them,

(Testimony of Raoul Wargny.)

I won't see them, you don't even have to give them to the reporter. The only papers that go to the Board and to me for determination are those received in evidence or those rejected exhibits. Papers marked for identification are not part of the record.

Q. (By Mr. Latimer): I show you what has been marked for identification as General Counsel's Exhibit No. 4——

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 4 for identification.)

Q. (By Mr. Latimer—continuing): ——and ask if you can identify that.

A. That's a formal application for employment.

Q. That was used in the spring and summer of 1956? A. Contract 1787.

Mr. Latimer: I will offer this in evidence, Mr. Examiner.

Trial Examiner: Any objections, gentlemen?

Mr. Morrison: I object on the grounds of relevancy, your Honor.

Q. (By Mr. Latimer): Can you tell me why the question is asked name of labor organization affiliated with and local number, why that is on the application blank? A. No, sir.

Trial Examiner: Do you offer it?

Mr. Latimer: It is offered. [29]

Mr. Morrison: I don't believe it is relevant.

Trial Examiner: I will overrule the objection and receive it in evidence and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 4.

(Testimony of Raoul Wargny.)

(The document heretofore marked General Counsel's Exhibit No. 4 for identification was received in evidence.)

Q. (By Mr. Latimer): Mr. Wargny, who would determine whether or not an employee can be hired at the job site?

Mr. Morrison: In what connection?

Mr. Latimer: Read the question, Mr. Reporter.

(Question read.)

Q. (By Mr. Latimer): Would it be necessary for the site superintendent to take it up with anyone on the job site if there was a steward on the site?

Mr. Hartlieb: The witness has already testified he didn't know anything about job site hires.

Trial Examiner: Do you know anything about that?

The Witness: Local hires, no, job site hires, yes, if they are hired out of Anchorage. If they were hired out of Anchorage—if he was a local hire in the area, no.

Mr. Latimer: That's all.

Trial Examiner: What's all?

Mr. Latimer: I am through.

Trial Examiner: He didn't answer the question.

Mr. Latimer: He said he didn't know. [30]

Trial Examiner: Any questions, Mr. Morrison?

Mr. Morrison: Yes, Mr. Examiner.

Cross Examination

Q. (By Mr. Morrison): When did you com-

(Testimony of Raoul Wargny.)

mence your employment with Morrison-Knudsen?

A. March 3rd, 1956.

Q. Had you been with them prior to your employment at Anchorage? A. Yes.

Q. And where had you been with them?

A. I was with them in 1951 in San Francisco on the Atlas construction job for French Morrocco and also in Seattle prior to coming up here as personnel manager in February of 1956.

Q. You were with them in 1951 in San Francisco? A. Yes.

Q. What were your duties?

A. I was a recruiter in the personnel office in San Francisco.

Q. How long did you work for them there?

A. Four months.

Q. You had not been employed by them at any time prior to 1951? A. No, sir.

Q. And thereafter, when did you next go to work for them? A. February 1956. [31]

Q. And where was that?

A. Seattle, Washington.

Q. And what was your position there?

A. Senior clerk.

Q. In the Morrison-Knudsen office in Seattle?

A. 2217 Third Avenue, Contract 1787 office.

Q. And how long were you employed as a senior clerk there?

(Testimony of Raoul Wargny.)

A. It was just about a month before I came here.

Q. And what were your duties as senior clerk?

A. In Seattle?

Q. Yes.

A. To hire men for the Contract 1787 project in Anchorage.

Q. Was this recruiting duty?

A. Recruiting various crafts and non-manual help too.

Q. Had you done personnel work or recruiting work for other contractors? A. Yes.

Q. And for whom?

A. With Brown, Pacific, Maxon for four years from 1951 to 1954.

Q. Where was their work?

A. Throughout the United States.

Q. And what was your work after '54 and until you went to work for Morrison-Knudsen?

A. I was in real estate and selling. [32]

Q. Had you ever had any particular education of a formal type in connection with personnel and employment practices?

A. Only through practical experience.

Q. Only through work as you have described it, four months with Morrison-Knudsen and then four years with Brown, Pacific, Maxon?

A. I was three years with that concern.

Q. Mainly concerned with Okinawa construction?

(Testimony of Raoul Wargny.)

A. Chiefly, that's all they had. I also was with Beckdahl in Arabia for eighteen months. I was also in the Aleutian Islands.

Q. What was the nature of your work then?

A. Personnel.

Q. Are you a college graduate, Mr. Wargny?

A. High school.

Q. Graduated from high school?

A. Yes, sir.

Q. Mr. Wargny, who was your direct superior on the Contract 1787 work?

A. Einar Erickson.

Q. And how long did you work for Morrison-Knudsen on their 1787 project?

A. Approximately six months.

Q. Until when?

A. March 3rd, 1956 until the latter part of July. It [33] wouldn't be quite six months.

Q. And did you terminate your employment in July with Morrison-Knudsen? A. That's right.

Q. And have not worked for them since?

A. No, sir.

Q. What has your employment been since July?

A. I was in San Francisco with Holmes and——

Q. What is the nature of that work?

A. Recruiting for Eniwetok.

Q. Now, Mr. Wargny, what was the source of the largest number of your employees for the work on 1787? A. Pertaining to crafts?

(Testimony of Raoul Wargny.)

Q. Well, yes, pertaining to crafts.

A. I would say laborers.

Q. I say, what was the source, where did you hire them; where did you get them?

A. I got them through the Anchorage offices and through the Anchorage locals.

Q. What do you mean through the anchorage offices?

A. Well, men that had worked for the company previously on the jobs before, preceding years, that were eligible for rehire, that were members of the union. Whenever they were requested and the man was eligible, we would ask for him by name to the union, and if they were available and in good [34] standing with the unions, they would be hired by Morrison-Knudsen.

Q. Was the union the person that went out and contacted these people that you wanted and advised them that there was a position available for them with Morrison-Knudsen?

A. If it was not a named request, yes.

Q. What if it was a named request?

A. If they were available and in good standing, they would dispatch them.

Q. How do you know whether or not they're in good standing or not?

A. Through our records and theirs. If he had worked for us previously and had a good record with the company, we would hire him again.

(Testimony of Raoul Wargny.)

Q. What do you mean by good standing?

A. A man that hadn't been discharged from his job before or he had an eligible for rehire slip, eligible rehire in his folder, which we maintain in the personnel department in Anchorage.

Q. That's Morrison-Knudsen's slip?

A. Right.

Q. When you say he is eligible for rehire, you mean so far as Morrison-Knudsen is concerned?

A. That's right.

Q. If you had a named person you wanted to hire, did you [35] personally contact that person?

A. Yes.

Q. By calling them directly?

A. That's right.

Q. And then what did they do?

A. The individual, he would go to the union and get his dispatch slip.

Q. And then report to you?

A. And then report to us for processing.

Q. Did you insist on seeing a dispatch slip from a named person before you hired them?

A. Definitely.

Q. Did any ever report without a dispatch slip?

A. Not to my knowledge.

Q. So there never was a case in which you had an opportunity to determine whether you would or would not hire a man who did not have a dispatch slip whom you had requested, they always had the dispatch slip when they arrived?

A. That's right.

(Testimony of Raoul Wargny.)

Trial Examiner: Did you tell these employees, the named employee, that he would have to go to the union to get a dispatch slip?

The Witness: Well, it was naturally understood if he was a member of the union that would be automatic.

Mr. Morrison: I move the answer be stricken.

Trial Examiner: Strike it out.

Will you read the question to the witness, please?

(Question read.)

A. Yes.

Q. (By Mr. Morrison): You told each employee whom you called, and I am now referring to past employees whom you wanted to rehire or from whom company records had appeared to be available and satisfactory to the company, is it your testimony that when you contacted those employees you told them that they would have to go to the union to get a dispatch slip?

A. If they were members of the union, yes.

Q. You did that in each instance?

A. Yes.

Q. Why did you do that?

A. Because you had to have them cleared through the union. They had to have a clearance before we could hire them.

Q. Where did you get that information?

A. It was just natural procedure.

Q. Who so advised you?

A. Nobody advised me so far as—well, I can't say exactly as to who definitely advised me.

(Testimony of Raoul Wargny.)

Q. Your testimony was that no one advised you that a man would have to have a dispatch slip from the union——

A. (Interrupting) It's general practice the way I understood it. [37]

Q. Well, answer my question. Did any one advise you that a man with Morrison-Knudsen, any one of your superiors or superior, advise you that an employee would have to have a dispatch slip before Morrison-Knudsen would hire them?

A. I can't say that anybody told me definitely, no.

Q. Now, the men you are hiring, what type of crafts were involved, say, within the scope of the labor classification under the A.G.C. contract? Are you familiar with the A.G.C.'s master labor agreement? A. I was at the time.

Q. Are you still familiar with it do you think?

A. I haven't seen it for a year.

Q. Was there a breakdown of craft classifications within the scope of the labor agreement?

A. Yes.

Q. About how many of these?

A. I don't recall.

Q. Did some of them involve various degrees of skill? A. No.

Q. What type of crafts were included within the labor classification? A. I don't remember.

Q. Do you remember any of them?

A. Well, laborers.

Q. Were all men within the scope of the master

(Testimony of Raoul Wargny.)

agreement [38] under the general labor classification, were they all general laborers?

A. No, they were classified.

Q. And do you recall any of the classifications?

A. No, I don't.

Q. May I ask if some of the classifications required greater skills than others?

A. You are talking strictly about the laborers union, aren't you?

Q. Yes, those men who fall within the jurisdictional scope of Local 341. A. Yes.

Q. Local 341 was the designated bargaining agent, were they not, for those employees who fell within the labor scope under the master agreement?

A. That's right.

Q. Now, but I am asking you, were all of these men unskilled common laborers who fell within that scope? A. No.

Q. Did some of them have to have substantial skills in various fields?

A. I don't know what you mean by substantial skill.

Q. Well, tell us the type of work that was covered by the laborers union. [39]

A. Well, laborers would come in the categories of——

Mr. Latimer (Interrupting): I am going to object to this line of testimony unless counsel offers the contract in evidence. The contract itself is the best evidence.

Trial Examiner: Overruled.

(Testimony of Raoul Wargny.)

Do you want the question read?

The Witness: Yes.

Trial Examiner: Will the reporter kindly read the question for the witness?

(Question read.)

A. Well, it would be, well, laborers that would dig ditches, I wouldn't know exactly how to designate them.

Q. (By Mr. Morrison): I take it anybody can dig a ditch if given a shovel, is that correct?

A. I imagine anybody could, yes.

Q. So that if all of the skills involved were similar to digging ditches, anyone could hold down a so-called laborers' job, is that correct?

A. That's right.

Q. Were there other jobs which required more skill which anyone without previous experience could not hold down the job? A. Yes.

Q. What were they called?

A. An oiler or greaser. [40]

Q. What was the nature of their work?

A. Greasing trucks.

Q. And what did an oiler do?

A. Oil trucks or tire changing, tire repair.

Q. And were jack hammer operators also included within the scope?

A. I believe they were.

Q. Is there some skill involved in operating a jack hammer? A. Definitely.

Q. Would you say a considerable amount of skill or just a little?

(Testimony of Raoul Wargny.)

A. I would say considerable.

Q. What about powder men?

A. They would be skilled.

Q. There would be a substantial amount of skill involved in powder men? A. Yes.

Q. What is a high scaler?

A. I wouldn't know.

Q. Some of these men handled, in addition to jack hammers, handled other types of equipment, do they not, saws, power-saws? A. Yes.

Q. And what is your own policy in obtaining employment, where did you find the best source of getting these semi-skilled men was? [41]

A. We found two sources. We found sources from the men that had worked for us in the past and also through the unions.

Q. So the union supplied skilled men when you specified to them what type you needed?

A. If they were available, yes.

Q. And if they had men available to send out. Were the men sent out by the union, was it your experience that they were able to do the job pretty satisfactorily?

A. I would never see the man actually at work so all I could designate it by was their paper.

Q. Were there any complaints from the superintendents as to the quality of work that the men did?

A. No, they wouldn't notify the personnel department.

Q. So that the union proved to be a pretty satis-

(Testimony of Raoul Wargny.)

factory place to obtain help, particularly in the skilled category, isn't that correct?

A. Well, not a hundred per cent.

Q. But substantially.

A. Substantially, yes.

Q. Now, on these college men you were talking about, was it your understanding that they actually already had a job with Morrison-Knudsen when they arrived in Alaska? A. Yes.

Q. Do you know who hired them? [42]

A. I guess you would say I did.

Q. Did you make the commitment to bring them all the way to Alaska? A. No.

Q. Do you know who made that commitment?

A. No.

Q. Did you know anything about them other than the fact that in your testimony Mr. Haugen advised you they were available?

A. That's the first I knew about it.

Q. Now, are you sure that it was Mr. Haugen that stated that they should be sent over to the union for clearance or did you just send them yourself as part of your procedure?

A. No, I didn't.

Q. What do you mean, no, you didn't?

A. I didn't send them myself direct without authority that they were going to be dispatched by the union. All I had to do was send them down there, that the arrangements had already been made that they could join the union and get a dispatch slip and cleared for jobs.

(Testimony of Raoul Wargny.)

Q. Who advised you of this?

A. Mr. Haugen.

Q. That's all you knew about those men?

A. That's right.

Q. Did you ever talk to them?

A. Yes, sir. [43]

Q. Did you ever tell them that they had to join the union? A. No, sir.

Q. What did you tell them?

A. I just told them that they were to go down to the union and join it and come back to the office for processing and dispatch to their jobs.

Q. You just told me that you did not tell them that they had to join the union. I asked you originally if you told them that they had to join the union.

A. And I said no. I didn't answer that question, did I?

Q. You answered it two ways. One, you said you didn't and the other time you said you didn't. What did you tell Mr.——

A. (Interrupting): Here's the way the thing started. Mr. Haugen called me at the personnel office and he said he had four college students from Seattle that were coming in to Anchorage for work for the summer and they were going to work as laborers, that arrangements had been made that they could go down to the union to join the union, Local 341; and as soon as they come in to send them there to get their dispatch slips and come

(Testimony of Raoul Wargny.)

back to the office to be processed and sent out on sites.

Q. When you talked to them, what did you tell them?

A. I didn't tell them anything. I told them when they had their dispatch slips, I said they would be processed for work. I never said they had to join the union or anything like that [44] because I didn't have to. They had already been told that they were cleared with the union.

Q. You mean when they arrived at your office they already had dispatch slips?

A. No, no. When they first came in to Anchorage they came in for processing and I told them to go down to the union to get their dispatch slips, that they would have to join the union. They were already cleared to go down through the union, they could get their dispatch slip by paying their fees to join the union.

Q. Then, it is now your testimony that you told them that they would have to join the union?

Mr. Latimer: I object to that, Mr. Examiner. He has answered that three or four times.

Trial Examiner: I will overrule the objection.

Will you tell us everything you remember telling these college boys? Were there four or five in the first place?

The Witness: Four. I thought at first five but I know it is four.

Trial Examiner: And they were colored fellows?

The Witness: Oh, no, college.

(Testimony of Raoul Wargny.)

Trial Examiner: College boys.

Mr. Morrison: University undergraduates.

Trial Examiner: Now, they came into your office, the four of them came in together? [45]

The Witness: That's right.

Trial Examiner: Will you tell us everything you remember now that you said to these four boys?

The Witness: When they came into the office, I told them that arrangements had been made for them to go down to the union to join the union, Local 341, and as soon as they received their dispatch slips to come back to the personnel office and we would process them for work as laborers on four different sites; and we sent each man out to a different site.

Q. (By Mr. Morrison): Did you tell them they had to join or did you tell them they simply had been——

A. (Interrupting): I said it had been arranged for them to join the union, get their dispatch slips and come back——

Q. (Interrupting): May I ask, is joining the union and getting a dispatch slip the identical thing?

A. You have to join the union first before you can get a dispatch slip.

Q. Do you know that?

A. I assume that.

Q. You do not know what is required to get a dispatch slip? A. No.

(Testimony of Raoul Wargny.)

back to the office to be processed and sent out on sites.

Q. When you talked to them, what did you tell them?

A. I didn't tell them anything. I told them when they had their dispatch slips, I said they would be processed for work. I never said they had to join the union or anything like that [44] because I didn't have to. They had already been told that they were cleared with the union.

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A. No, no. When they first came in to Anchorage they came in for processing and I told them to go down to the union to get their dispatch slips, that they would have to join the union. They were already cleared to go down through the union, they could get their dispatch slip by paying their fees to join the union.

Q. Then, it is now your testimony that you told them that they would have to join the union?

Mr. Latimer: I object to that, Mr. Examiner. He has answered that three or four times.

Trial Examiner: I will overrule the objection.

Will you tell us everything you remember telling these college boys? Were there four or five in the first place?

The Witness: Four. I thought at first five but I know it is four.

Trial Examiner: And they were colored fellows?

The Witness: Oh, no, college.

(Testimony of Raoul Wargny.)

Trial Examiner: College boys.

Mr. Morrison: University undergraduates.

Trial Examiner: Now, they came into your office, the four of them came in together? [45]

The Witness: That's right.

Trial Examiner: Will you tell us everything you remember now that you said to these four boys?

The Witness: When they came into the office, I told them that arrangements had been made for them to go down to the union to join the union, Local 341, and as soon as they received their dispatch slips to come back to the personnel office and we would process them for work as laborers on four different sites; and we sent each man out to a different site.

Q. (By Mr. Morrison): Did you tell them they had to join or did you tell them they simply had been——

A. (Interrupting): I said it had been arranged for them to join the union, get their dispatch slips and come back——

Q. (Interrupting): May I ask, is joining the union and getting a dispatch slip the identical thing?

A. You have to join the union first before you can get a dispatch slip.

Q. Do you know that?

A. I assume that.

Q. You do not know what is required to get a dispatch slip? A. No.

(Testimony of Raoul Wargny.)

Trial Examiner.: Do you happen to remember the names of these four college boys?

The Witness: No, I don't.

Q. (By Mr. Morrison): Mr. Wargny, in connection with a [46] request by superintendents for employees, you say that was handled by radio requests? A. The majority of cases, yes.

Q. They would radio to your central hiring office? A. Yes.

Q. Incidentally, was most of the hiring done at Anchorage for the various projects?

A. It was divided in two sections between Anchorage and Fairbanks. The request would come into Anchorage and if it belonged in the Fairbanks jurisdiction, we would transmit it to our representative there.

Q. What was the principal central office for employment? A. The Pomeroy Building.

Q. At Anchorage? A. Yes.

Q. And Anchorage was a suboffice, you might say?

A. Suboffice of the Anchorage office, yes.

Q. And were all hires cleared first through the Anchorage office?

A. They were requested from the Anchorage office, yes. In other words, the site superintendent would radio the Anchorage office regardless of whether it was from Nome or Galena or whichever section it was, it would come into the Anchorage office by radio. If it didn't pertain to a man belonging to the Anchorage area, then we would

(Testimony of Raoul Wargny.)

transmit the message to our [47] representative in Fairbanks for that jurisdiction.

Q. I see. Now, how were these requests made? In other words, what would a typical message say?

A. A typical message would say that they needed so many laborers, so many electricians, truck drivers, mechanics, or whatever type of help they needed on that particular site.

Q. I take it that you keep these radio messages to a minimum as a matter of practice, in other words. The amount of words you use in a radio message, is that cut down or do they go into quite a bit of detail?

A. It all depended on just what type of—if they needed a particular — they wouldn't elaborate on anything. They would just say, if they wanted a truck driver, they would tell us what kind of truck driver they wanted. They wouldn't just say a truck driver. They would tell us a heavy-duty truck driver, or a dump truck driver, or they wanted one over so many cubic yards and so on.

Q. So the only message you got from the job superintendents in the request message was a specification of the type of a job to be filled and how many men they needed?

A. In most cases, yes.

Q. In the particular classification?

A. Unless they would name an individual that they wanted, yes.

Q. And if they would name an individual, they would simply name the individual or individuals?

(Testimony of Raoul Wargny.)

A. That's right. [48]

Q. And was there any further information that they would customarily put?

A. They would tell us when they wanted them on the job site.

Q. Was there any further information on these radios? A. Not generally.

Q. Generally it was just a straight inquiry to you for either a named or unnamed person for particular jobs at particular times?

A. That's right.

Q. And it was up to you to get them?

A. That's right.

Mr. Morrison: I have no further questions.

Trial Examiner: Mr. Hartlieb, do you have any questions?

Cross-Examination

Q. (By Mr. Hartlieb): Mr. Wargny, do you have any idea of what percentage of men in the Anchorage area who commonly do laborer's work belong to a labor organization? You don't have any idea about that? A. No, sir.

Q. Directing your attention to the college boys. I think you stated that they went over to the union hall and joined the union? A. Yes. [49]

Q. Are you sure that that's the way it occurred?

A. That's my recollection, yes.

Q. They physically went over to the union hall and then came back? A. That's right.

Q. Mr. Wargny, tell us, if you know, what per-

(Testimony of Raoul Wargny.)

centage of the men working at Big Mountain were sent out of the Anchorage area?

A. I haven't any idea.

Q. You don't have any idea? A. No, sir.

Q. In other words, you don't know then, don't have any idea how many people were hired in the Big Mountain area as distinguished from the Anchorage area? A. No, sir.

Q. Tell us, if you know, and I understand, I realize that you may very well not know, do you have any idea of what the percentage of union men on the Big Mountain job was in the labor classification?

A. No, sir, I haven't any idea.

Mr. Hartlieb: May I have a minute, sir?

Trial Examiner: We will take a short recess.

(Short recess.)

Trial Examiner: Yes, are you ready to proceed?

Mr. Latimer: Yes. [50]

Trial Examiner: Will you kindly resume the witness stand, Mr. Wargny?

Q. (By Mr. Hartlieb): Mr. Wargny, you testified on direct examination that, I believe this was the substance of your testimony, that the site superintendent called you and requested men and that you in turn then called Local 341 and asked for an individual by name if the site superintendent had requested an individual by name, wasn't that your testimony in substance? A. Yes.

Q. Can you ever remember an instance, sir,

(Testimony of Raoul Wargny.)

where the union refused to send a man that they had named?

A. Yes, but I don't recall the individual's name.

Q. You can't remember the name?

A. No, sir.

Q. But you are sure that there was such a request and such a refusal? A. Yes, sir.

Q. In how many instances, sir?

A. Very few instances. I would say it wouldn't be over three during my term.

Q. If you know, Mr. Wargny, what was the reason for refusal?

A. Well, one case I remember was that the individual that was requested was not a member of the union and they had so many men on the bench that had priority that they didn't want to accept any more. [51]

Q. You don't remember that individual's name, though? A. No, sir, I don't.

Q. Do you know whether or not he was subsequently hired by M-K? A. I do not.

Q. He could have been hired, though?

A. He could have been, yes, but I don't recall any case where he was.

Q. Mr. Wargny, you have in answer to prior questions indicated that you have had quite a history of personnel work in the construction industry dating back to 1944; did I understand correctly?

A. Yes.

Q. You further testified that nobody specifically told you that only union people could be hired by

(Testimony of Raoul Wargny.)

yourself. Is it possible, Mr. Wargny, that you brought that impression to the territory with you as a carry-over of your previous experience in personnel work? A. No, sir.

Q. But you can't tell us who gave you those directions? A. No, sir.

Q. Did anybody, Mr. Wargny, that was over you in your job with M-K ever tell you that you couldn't hire nonunion people?

A. No, sir. [52]

Q. As a matter of fact, could you hire nonunion people? A. Yes, sir.

Q. And as a matter of fact, did you ever hire nonunion people? A. No, sir.

Q. Did anybody from Local 341 ever, by either direct words or inference, threaten any repercussions if you hired nonunion people?

A. Not that I recall.

Q. Did anybody from Local 341, by inference or otherwise, ever threaten repercussions if you hired other than through the union hall regardless of whether they were union or nonunion?

A. Well, I recall one instance. I don't exactly remember what the inference was about the case that I had. There was some discussion at one time over the telephone with one of the members of the union about some trouble of some kind but I don't recall the circumstances surrounding the individual or the case. So I wouldn't be able to elaborate on that any more than that I did have a discus-

(Testimony of Raoul Wargny.)

sion which wasn't a very happy one over the telephone at the time.

Mr. Morrison: I move that the answer be stricken.

Trial Examiner: Motion denied.

Q. (By Mr. Hartlieb): Mr. Wargny, back to these college men. They had been hired before they came to the territory, had they not? [53]

A. That I don't know.

Q. Was there any question in your mind but what Morrison-Knudsen was going to put them to work?

A. Before they came to Anchorage?

Q. When they got there. A. No.

Mr. Hartlieb: I have no further questions.

Trial Examiner: Mr. Latimer, any questions?

Redirect Examination

Q. (By Mr. Latimer): Mr. Wargny, you said it was the general practice to clear through the union. Was that the practice that you discovered when you went to work for Morrison-Knudsen as personnel officer? A. Yes.

Mr. Latimer: Will you mark this, please?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 5 for identification.)

Q. (By Mr. Latimer): I show you what has been marked for identification as General Counsel's Exhibit No. 5 which purports to be the A.G.C.-A.F.L. Alaska master labor agreement for 1956, and

(Testimony of Raoul Wargny.)

ask you to refer to Page 27, laborers classification and wages and ask you to look over the classifications on that page, and ask you to look at Page 25, Schedule B, teamsters classification and wages and ask you to look over [54] those classifications and ask if you were correct in your testimony when you referred to laborers being greasers and oilers.

Trial Examiner: You mean members of 341?

Mr. Latimer: Yes, sir, as members of 341.

Q. (By Mr. Latimer): You were speaking from memory, I take it, when you testified?

A. Yes. At the time I made the statement, I wasn't absolutely sure about the greasers, but I see now that it is the teamsters classification and not a laborers classification.

Mr. Latimer: I offer General Counsel's Exhibit 5, Mr. Examiner.

Trial Examiner: Any objection?

Mr. Morrison: I have no objection, Mr. Examiner.

Mr. Hartlieb: No objection.

Trial Examiner: There being no objection, the booklet is received in evidence and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 5.

(The document heretofore marked General Counsel's Exhibit No. 5 for identification was received in evidence.)

Q. (By Mr. Latimer): Mr. Wargny, when you received these radio messages from the site superintendent requesting employees, after you called

(Testimony of Raoul Wargny.)

the union, would you make any note on the radio message itself? A. Yes. [55]

Q. What sort of a note would you make on the message?

A. On the bottom of the message we would put down the two letters U.C. and the date which means that the union was called on that date pertaining to that message and signed by our initials.

Q. You testified a moment ago, I believe, that the boys, the college boys, went to the union hall. Did you go with them to the union hall?

A. No, sir.

Q. Did you see them go to the union hall?

A. No, sir.

Q. Then, you don't know whether they actually went there, do you? A. Not physically, no.

Q. Does the name Morris A. Abolins mean anything to you? A. Yes.

Q. Ronald S. Crowe? A. Yes.

Q. Joel I. Garnes? A. Yes.

Q. Robert Bleeck? A. Yes.

Q. Who are those people?

A. Those are the four college boys from Seattle.

Q. That we have been discussing? [56]

A. Yes, sir.

Mr. Latimer: Now, Mr. Examiner, I am going to press my questions on General Counsel's 3 for identification. Counsel for the company opened the door on other craft and I am going to ask the witness——

Mr. Morrison (Interrupting): Mr. Examiner, be-

(Testimony of Raoul Wargny.)

fore we get into that, I would like to know how we opened the door concerning other crafts. I asked the man the type of craft within the labor category. He happened to get a couple that were not. That had to do with the problems involved in obtaining competent employees among the labor classifications and why it was necessary to go to the union as the best source. I don't see what that has to do with Exhibit 3 that General Counsel is talking about.

Mr. Latimer: It indicates that what the witness testified to is a fact. They did go to the various labor organizations for their help.

Mr. Morrison: We don't argue that point, but that's not an issue here.

Trial Examiner: There is nothing before me at the present time, so I can't rule on it.

Q. (By Mr. Latimer): I show you what has been marked for identification as General Counsel's Exhibit 3-B and ask if you can identify that?

A. Yes, sir. [57]

Q. What is it?

A. Dispatch slip from Local 302.

Q. Of the——

A. (Interrupting): International Union of Operating Engineers.

Q. For James and Ben Aldrich?

A. Yes, sir.

Q. Dated June 7, 1956? A. Yes, sir.

Q. I ask you to look at General Counsel's for identification 3-C, and ask if you can identify that?

(Testimony of Raoul Wargny.)

A. Yes, sir.

Q. What is that?

A. It is a telegram stating that Jim and Ben——

Mr. Morrison (Interrupting): I object to what the telegram states.

The Witness: It is a telegram from Seattle.

Q. (By Mr. Latimer): Who is it from?

A. Al Kissinger from our Seattle office.

Q. Office manager for whom?

A. Morrison-Knudsen.

Mr. Latimer: I offer General Counsel's 3 through 3-C, Mr. Examiner.

Mr. Morrison: We object, Mr. Examiner, on the same ground on which the matter was originally rejected or withdrawn. [58] It has nothing to do with Local 341 or Morrison-Knudsen.

Trial Examiner: Under what paragraph?

Mr. Latimer: If you will refer to Paragraph 10 in the complaint, Mr. Examiner, I think that covers it sufficiently to receive these documents from this testimony in evidence.

Mr. Morrison: The complaint alleges an agreement between Morrison-Knudsen and Local 341 whereby we required, as a condition of hire, membership in Local 341.

Mr. Latimer: Paragraph 10 states by its agreement, arrangements or practice and its course of action described above respondent, M - K, individually and through Local 341 as its hiring agent and so forth.

Trial Examiner: What about that, Mr. Morrison?

(Testimony of Raoul Wargny.)

Mr. Morrison: Well, it was my understanding from the full text of the complaint that this alleged agreement between M-K and Local 341—I am not prepared to go into what arrangements, if any, M-K might have with all of the other crafts and unions involved. You cannot take one specific item of correspondence here which in many respects is hearsay involving a completely different organization.

Trial Examiner: He is not only accusing you, your client rather, or violating the Act in connection with certain dealings with Local 341, but he is also alleging that you individually have discriminated in the hire of employees with respect to applicants for employment to encourage membership in a labor organization. [59]

Mr. Morrison: In connection with named employees. I don't think that the complaint is a carte blanche to——

Trial Examiner (Interrupting): It is not artistically framed, I will agree with you, but it seems to be some basis for Mr. Latimer's argument.

Mr. Morrison: If the scope of this inquiry is to go into our relationships with all employees——

Mr. Latimer (Interrupting): I don't propose to do that, Mr. Morrison.

Mr. Morrison: I am going into it. If you are going to bring up a collateral matter, I may have to meet with it on the same basis. I am wholly unprepared to go into the records concerning what

(Testimony of Raoul Wargny.)

might have occurred with other crafts and other individuals.

Trial Examiner: At the conclusion of the General Counsel's case, if you think you need more time to prepare your defense, I will entertain an application for an adjournment or give you time, and I will give you some time to prepare, to meet this matter that you call, designate as a collateral matter.

Mr. Morrison: Defense against whom or what?

Trial Examiner: I don't know. Maybe you won't have to meet anything.

Mr. Hartlieb: Mr. Hearing Officer, I would like [60] to object to it on behalf of the union for the reason he alleges practice or agreement between M-K and Local 341. I take the position that there is no evidence of such a practice.

Trial Examiner: Not against your client. That's clear enough. It is not against, it can't be used as any kind of an agreement binding upon your client.

Mr. Hartlieb: Or to show any policy or pattern on the part of the dealings.

Trial Examiner: I will overrule the objections and receive the papers in evidence and I will ask the reporter to kindly mark them as General Counsel's Exhibits 3, 3-A, 3-B, and 3-C, respectively.

(The documents heretofore marked General Counsel's Exhibits Nos. 3, 3-A, 3-B, and 3-C for identification were received in evidence.)

Mr. Latimer: No further questions.

Trial Examiner: Any questions, Mr. Morrison?

(Testimony of Raoul Wargny.)

Recross-Examination

Q. (By Mr. Morrison): Mr. Wargny, during the five and a half or six months of your employ-M-K and the union to the effect that only union men would be hired and that the company would use the union hall as its sole source of recruitment for labor? A. No, sir.

Q. That never occurred? [61] A. No, sir.

Mr. Morrison: I have no further questions.

Recross-Examination

Q. (By Mr. Hartlieb): Mr. Wargny, while you were personnel manager for M-K, were you ever told or were you aware of any agreement between between M-K and the union to the effect that only union men would be hired and that the company would use the union hall as its sole source of recruitment for labor? A. No, sir.

Q. You knew of no such agreement, neither oral or tacit? A. No, sir.

Mr. Hartlieb: I have no more questions.

Mr. Latimer: No questions.

Trial Examiner: You are excused, sir.

(Witness excused.)

Trial Examiner: We will stand adjourned now until 1:45.

(Whereupon a recess was taken until 1:45 o'clock, p.m.) [62]

After Recess

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 1:45 o'clock, p.m.)

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Latimer: Yes, sir.

Mr. Hartlieb: Yes, sir.

Trial Examiner: Will you kindly call your next witness, Mr. Latimer?

Mr. Latimer: Mr. Abolins.

Trial Examiner: Will you step forward, sir, and be sworn?

MORRIS A. ABOLINS

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Morris A. Abolins.

Trial Examiner: And where do you live?

The Witness: Sumner, Washington.

Trial Examiner: Mr. Latimer, you may proceed with the examination of the witness who has been duly sworn.

Direct Examination

Q. (By Mr. Latimer): Mr. Abolins, did there come a time in 1956 when you were offered a job with the Morrison-Knudsen Construction Company?

A. Yes, there did.

Q. How did that come about? [63]

A. At the time I just graduated from high school and was preparing to enter the University

(Testimony of Morris A. Abolins.)

of Washington and Mr. Tippy Dye, the coach of the University of Washington basketball team, he offered me a job up here in Alaska for the summer so I could get some money to go to school.

Q. Did he tell you who the job was with?

A. Yes, with the Morrison-Knudsen Construction Company.

Q. And did you come to Alaska?

A. Yes, I did.

Q. About when was that?

A. On the 10th day of June, I believe it was. It was a June day.

Q. 1956? A. 1956.

Q. What did you do when you got to Anchorage?

A. The first thing we did—Mr. Wyley, who is in charge of getting the jobs for the athletes at the University of Washington, gave us a few names we were supposed to get in touch with here. Among them was Mr. Erickson and three other gentlemen whose names I do not recall, but one of whom was a Peterson, I believe.

Trial Examiner: Who is we?

The Witness: We is the four of us, myself, Ron Crowe, Joel Garnes and Robert Bleeck.

Q. (By Mr. Latimer): All four of you came up together? [64] A. Yes, sir.

Trial Examiner: How do you spell Mr. Wyley's name?

The Witness: W-y-l-e-y.

Q. (By Mr. Latimer): Do you see Mr. Erickson in the hearing room? A. Yes, I do.

(Testimony of Morris A. Abolins.)

Q. Do you recognize him? A. Yes.

Q. Tell us, after you got to Anchorage what did you do?

A. Well, we first tried to contact the Morrison-Knudsen offices by phone but there was no answer so we went down to the office, down there across the railroad tracks, and somebody there told us that there was no one there at that particular day. It was Sunday and he told us to come back the next day, which we did.

Q. Then that was on a Monday you went back?

A. Yes.

Q. Where did you go on that day?

A. Down to the same place.

Q. What happened after that?

A. We went into the office. We saw a gentleman there, I don't know who it was now, but he told us that they had been expecting us. We had identified ourselves to him and he said that we would have to go through the Union Hall and then they would dispatch us to the job site. [65]

Q. You don't know who you talked to at that place?

A. No, I don't know the gentleman's name.

Q. What happened next?

A. He called up Harold Rothias.

Q. You mean Grothias?

A. He is the gentleman that's sitting there in the second row.

Q. I mean who is he?

(Testimony of Morris A. Abolins.)

A. He said he was in charge of the Union Hall of hiring.

Trial Examiner: How do you spell his name?

Mr. Latimer: G-r-o-t-h-i-a-s.

Trial Examiner: What position or affiliation did he have with the Union 341 in June of 1956?

Mr. Hartlieb: Excuse me, sir, it's G-r-o-o-t-h-i-a-s. He is the business representative.

Trial Examiner: He was in June '56?

Mr. Hartlieb: Yes, sir.

Q. (By Mr. Latimer): Go ahead, tell us what happened?

A. This named gentleman came down and we went into a room in one of the offices at Morrison-Knudsen Company.

Q. Wait a minute. Before this happened, had you talked to Mr. Harrison connected with Morrison-Knudsen Company?

A. Yes, this gentleman.

Q. You don't know who it was?

A. A gray haired gentleman, fairly heavy set. [66] He was in the front office. We went into one of these rooms, one of the other empty offices.

Trial Examiner: That's at the Union Hall?

The Witness: No, we didn't go to the Union Hall just as yet.

Q. (By Mr. Latimer): This was at the Morrison-Knudsen Company? A. Yes.

Q. Did Harold Groothias come down at that time? A. Yes.

Q. Tell us what happened.

(Testimony of Morris A. Abolins.)

Trial Examiner: Who was present when you had this conversation that you are about to relate?

The Witness: The four of us and Harold——

Q. (By Mr. Latimer—interrupting): Who is the four of us?

A. Myself, Crowe, Garnes and Bleeck.

Q. So Groothias took you back to an unoccupied office? A. Yes.

Trial Examiner: Where?

The Witness: At the Morrison-Knudsen Company offices.

Q. (By Mr. Latimer): Tell us what happened.

A. Well, it was there, to the best of my recollection, that we filled out our applications to join Local 341.

Q. Who gave you the application?

A. Harold did. [67]

Q. I hand you what has been marked for identification as General Counsel's Exhibit No. 6 and ask you if that is the type of application you filled out for Harold Groothias at that time?

A. Yes, it is.

Mr. Morrison: Mr. Examiner, there is considerable material on the back of this, I have not seen it heretofore.

Trial Examiner: Go ahead and read it.

Q. (By Mr. Latimer): Had you talked to Mr. Erickson before——

Trial Examiner (Interrupting): Wait a minute. Mr. Morrison wants to read the paper you just handed to him.

(Testimony of Morris A. Abolins.)

Mr. Latimer: I beg your pardon, sir.

Mr. Morrison: May I ask some questions on voir dire?

Trial Examiner: He just showed it to him. He is not offering it.

Mr. Morrison: Maybe your procedure is somewhat different than what I am accustomed to. Normally, the exhibit is identified and submitted to the witness for identification and then at that point we make our objections. I wonder if you intend to offer it.

Mr. Latimer: Yes, I intend to offer it.

Mr. Morrison: What number has this been designated as?

Trial Examiner: Six.

Q. (By Mr. Morrison): Mr. Abolins, did you read the application at the time you filled it out?

A. Yes, sir, I made it a point to read it. [68]

Q. Did you read this exhibit?

A. Now, not on the other side of it, no.

Q. How do you know whether this, then, is the application you signed at the time you have just been telling us about?

A. I read it before he came here, but I saw it before the hearing opened and I know it is the same one.

Q. Do you recall signing such an application?

A. Oh, yes.

Trial Examiner: Are you offering the paper in evidence?

Mr. Latimer: Yes, sir.

(Testimony of Morris A. Abolins.)

Trial Examiner: Any objection?

Mr. Morrison: I object on the ground of materiality. This is an unsigned application.

Trial Examiner: I will overrule the objection and receive the paper in evidence and ask the reporter to kindly mark it as General Counsel's Exhibit No. 6.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 6 for identification and was received in evidence.)

Q. (By Mr. Latimer): After you signed the application for membership in 341, did you have a further conversation with Mr. Groothias?

A. Not at that time.

Q. What did he tell you when you signed the application? [69]

A. Well, he said that we were to, in order to work, we would have to join the union and he said that generally it is accepted practice for the individual, when he desires to join the union, to pay the $50 initiation fee at the time he joins. However, he said he was making a special exception in our case and he would let us go out there owing him the money. But he put it very clearly to us, that if we did not send the money in within the first or second pay check, he would come out and get us, or that was the idea I got.

Q. Did Mr. Groothias tell you what the dues, initiation fees would be? A. Yes.

Q. What did he say they would be?

A. The initiation fee, if I recall correctly, was

(Testimony of Morris A. Abolins.)

$50 last year, and the dues were $6 a month for the months that the construction was in effect, and $3, I believe, $2 or $3 the other months.

Q. Did you pay your dues and initiation fees at that time? A. Not at that time.

Q. When did you pay your dues and initiation fees?

A. After I got out to the site and had received my second pay check.

Q. Do you remember how much you paid?

A. Yes.

Q. How much did you pay? [70]

A. Ninety-eight dollars.

Q. Did you get a receipt for that?

A. Yes, I did.

Q. I hand you what has been marked for identification as General Counsel's Exhibit No. 7 and ask if you can identify that. What is that?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 7 for identification.)

A. That is the receipt I received from Mr. Groothias.

Q. For your dues and fees? A. Right.

Q. In the amount of how much?

A. Ninety-eight dollars.

Q. Showing your dues paid up until when?

A. Until June of this year.

Mr. Latimer: I offer this in evidence, Mr. Examiner.

Trial Examiner: Any objection?

(Testimony of Morris A. Abolins.)

Mr. Morrison: I haven't seen it yet.

Q. (By Mr. Latimer): According to General Counsel's Exhibit 7, which is a receipt for your fees and dues, you paid $98, is that correct?

A. Yes.

Q. This represents $50 initiation fee and dues for the entire year, is that correct? [71]

A. Yes.

Mr. Latimer: I offer it in evidence.

Trial Examiner: Any objection?

Mr. Morrison: No objection.

Mr. Hartlieb: No objection.

Mr. Latimer: May I withdraw the original and substitute photostatic copies?

Trial Examiner: Any objection?

Mr. Morrison: No objection.

Trial Examiner: There being no objection, the papers will be received in evidence and I will kindly ask the reporter to mark it General Counsel's Exhibit 7. And the General Counsel may substitute photostatic copies in lieu of the original thereof.

(The document heretofore marked General Counsel's Exhibit No. 7 for identification was received in evidence.)

Q. (By Mr. Latimer): Mr. Abolins, after you had filled out your application for membership in the union, what happened after that?

A. After that, Mr. Groothias very kindly consented to give us a ride up to the Morrison-Knudsen employment office which was some distance away and there we were told to come back at a later

(Testimony of Morris A. Abolins.)

time. I believe Mr. Wargny told us that he would call us when he wanted to see us. And so we went back to our motel [72] and Mr. Wargny called us later on in the day and we came back. And it was at that time that a gentleman was working at the office. I believe he was one of Mr. Wargny's assistants who took us over to the Union Hall where we got our dispatch slips from Mr. Groothias.

Q. I show you what has been marked for identification as General Counsel's Exhibit 8 and ask you if you can identify that.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 8 for identification.)

A. Yes.

Q. What is it?

A. A dispatch slip from the Union Hall.

Q. Is that a photostatic copy of the dispatch slip you got at the Union Hall? A. Yes, it is.

Mr. Latimer: I offer it in evidence. Counsel has seen it.

Trial Examiner: Any objection?

Mr. Morrison: No objection.

Trial Examiner: There being no objection, the paper is received in evidence and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 8.

(The document heretofore marked General Counsel's Exhibit No. 8 for identification was received in evidence.) [73]

(Testimony of Morris A. Abolins.)

Mr. Latimer: May we go off the record, Mr. Examiner?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Latimer): Do you know Mr. Erickson? A. Not personally, no.

Q. Do you recall whether or not you talked to him when you came to the Morrison-Knudsen office in June, when you first reported up here?

A. To the best of my recollection, Mr. Erickson was busy at the time we entered the office and we never did talk to him personally.

Q. You don't know who you talked to at the Morrison-Knudsen office? A. No.

Q. After you picked up your dispatch——

Mr. Morrison (Interrupting): The record will show no answer, indicating, I suppose in the negative.

The Witness: No.

Q. (By Mr. Latimer): After you picked up your dispatch slips from the Union Hall, what happened then?

A. After that we went back to the employment office which was located in a quonset hut, I believe, and from there—— [74]

Q. (Interrupting): Of Morrison-Knudsen Company?

A. Yes, Morrison-Knudsen Company employment office.

Q. What did you do with your dispatch slip?

(Testimony of Morris A. Abolins.)

A. One I took out to the site with me and gave it to the shop steward.

Q. Wait a minute. How many slips did you get from the Union Hall? A. Two, I believe.

Q. Both the same color?

A. No; one was yellow.

Q. And one was white? A. Yes.

Q. What did you do with the white slip?

A. The white one, I believe, I gave to the girl at the office.

Q. Of Morrison-Knudsen? A. Yes.

Q. What happened after that?

A. After that she wrote out the travel order, or travel request, whatever you call it, and I didn't get mine until almost closing time that night because some other fellows had to go out before I did. But after that she wrote up the travel order and had the baggage weighed and everything and I left the next day.

Q. Where were you assigned to work?

A. Site No. 2 at Big Mountain. [75]

Q. Do you know what happened to the other three lads that came up with you, Crowe and Garnes and Bleeck? Do you know where they went?

A. Crowe went——

Mr. Morrison (Interrupting): I want to object, unless he knows of his own knowledge.

Trial Examiner: Is there any doubt that they were assigned to three different jobs?

Mr. Latimer: I will withdraw the question.

(Testimony of Morris A. Abolins.)

Q. (By Mr. Latimer): Did all four of you go to the same site? A. No, we didn't.

Q. Were you present when the other three lads, Bleeck, Crowe and Garnes were assigned?

A. Yes.

Q. In the personnel office?

A. Yes, they told us where we would be going.

Q. Did you hear where they were going to be sent? A. Yes.

Q. Where were they sent?

A. Crowe went out to Cape Romanzoff, Bleeck went out to Hinchenbrook and Garnes went out to Newenham.

Q. After you reported to site 2 at Big Mountain, who did you report to out there?

A. Well, you mean as far as the labor steward?

Q. What did you do when you got out there?

A. First of all, I got off the plane and I [76] was assigned a room and a bed in a quonset hut and I reported to the office they have up there.

Trial Examiner: Whose office?

The Witness: The office of the site superintendent, Bruce Shumway.

Trial Examiner: You mean the company office?

The Witness: Yes. And they told me to report to the labor foreman.

Q. (By Mr. Latimer): Who told you to do that? A. The site clerk.

Q. Do you know what his name was?

A. No, I have forgotten right now.

Q. Does Wilson mean anything to you?

(Testimony of Morris A. Abolins.)

A. No, I don't believe it was Wilson.

Q. Did you check in with the job steward up there, union job steward?

Mr. Morrison: Mr. Examiner, I don't want to keep entering objections here, but I think that these leading questions——

Mr. Latimer (Interrupting): I withdraw the question.

Mr. Morrison: There has been a series of them and I want to object.

Q. (By Mr. Latimer): Did you report to anyone else after you got up to the job site?

A. The second or third day I was up there, I am not sure which, I finally found the job steward.

Q. What was his name? [77]

A. Steve Alukas.

Q. Did you have a conversation with him?

A. Yes, I did.

Q. Tell us what was said.

A. He asked me if I had paid my dues and I said no. He said that I should pay them with the first check that I got and send it by mail—give it to him and he would send it in to Anchorage and pay it.

Q. What else was said? Tell us the whole conversation between you and Alukas. What did you say to him?

A. I said that I had a previous commitment. I said my first check would go for my fare up here and he did not like that idea in the least. He said that my first commitment was, of course, the union

(Testimony of Morris A. Abolins.)

or they would put me out of a job. If it hadn't been for them I wouldn't be out there. Well, I finally agreed that I should pay the union with my second pay check, which I did.

Q. Do you know a party out there, that was working out there at that time, by the name of Ingram?

A. Yes. He was a powder man and after Alukas was made a foreman by the site superintendent Shumway, Ingram became the new labor steward.

Q. Was that in the summer of '56? [78]

A. Yes, it was.

Q. Did you have a conversation with Ingram about the employment of natives out there?

A. Yes, I did.

Trial Examiner: When did you have the conversation?

The Witness: Would you like the date?

Trial Examiner: Before he was shop steward or after?

The Witness: After he was shop steward. They had some natives up there who had come in from Pile Bay, I believe it was——

Mr. Morrison (Interrupting): Before he goes further, Mr. Examiner, I am going to object to his testifying as to a conversation with Roy Ingram concerning employment of natives until I find out in what connection that's binding on Morrison-Knudsen or what the purpose of the inquiry is.

Trial Examiner: Do you want to state your——

Mr. Latimer (Interrupting): Yes, sir. Ingram

(Testimony of Morris A. Abolins.)

was the job steward representing Local 341 up there. He succeeded Alukas after Alukas had been made foreman. I will withdraw my other question and lay a foundation for it, Mr. Examiner.

Q. (By Mr. Latimer): At the time you were working out there, during the summer of 1956, were there any natives of that locality working on the job?

A. We did not have any natives until the latter part of the summer and then we had two or three.

Q. Do you know where they were from? [79]

A. To the best of my knowledge they were from Pile Bay.

Q. Was Roy Ingram job steward at this time?

A. He was.

Q. Was this after Alukas, the former job steward, had been made foreman? A. Yes.

Q. Did you have a conversation with Ingram about these natives? A. Yes, I did.

Q. Who was present?

A. That I do not recall. As far as I know, just the two of us.

Q. Give us your best recollection of what you said and what Ingram said.

Mr. Morrison: I am going to object, your Honor, on the ground that if this proceeding were singularly against the union, it is against the union and the company and as to us, it is, of course, pure hearsay and I think any testimony showing conspiracy has to involve both of us. I, therefore, ob-

(Testimony of Morris A. Abolins.)

ject to any conversation with Mr. Ingram or any other labor representative.

Trial Examiner: Some evidence might come in with respect to one of the respondents in this proceeding and might not be binding upon the other respondent. So I will have to take it [80] and it might not be binding upon your client, but it might be binding on Mr. Hartlieb's client. You may proceed.

Q. (By Mr. Latimer): Tell us your best recollection of the conversation.

A. Well, as it was, I just asked him if the natives had belonged to a union and he said that they did not but in order to keep working at this site much longer, he said they would have to join the union or else they would be discharged. They would force the company to fire them.

Mr. Latimer: Your witness.

Trial Examiner: Any question, Mr. Morrison?

Mr. Latimer: One more question, please.

Q. (By Mr. Latimer): How long did you remain on the Big Mountain job?

A. Until September the 3rd or 4th.

Q. And then what happened?

A. Then I took a plane to Anchorage and went back to the States.

Q. You resigned at that time? A. Yes.

Q. You voluntarily resigned? A. Yes.

Cross-Examination

Q. (By Mr. Morrison): What was the time of resignation?

(Testimony of Morris A. Abolins.)

A. The 3rd or 4th of September. [81]

Q. Mr. Abolins, did you ever belong to a union in the State of Washington? A. Yes, I did.

Q. What union did you belong to?

A. It was a cannery workers union.

Q. I see. And how long had you belonged to that?

A. For three months, make that five months.

Q. When was that?

A. That was in the summer of '55, 1955.

Q. Did you ever belong to a construction craft union? A. No, this is the first one.

Q. Were you a member of the Cannery Workers Union when you came to Alaska in '56?

A. No, I had gotten a withdrawal from them.

Q. What is the significance of withdrawal? Are you still a member subject to paying dues?

A. Inactive, I guess. I am not a member any more. I just withdrew because, then, when I wanted to join up again I wouldn't have to pay initiation fee. I could just start out by paying the dues.

Q. I see. So that you were an inactive member of the Cannery Workers Union? A. Yes.

Q. Did you advise anyone in connection with Morrison-Knudsen that you were a member of the Cannery Workers Union? [82]

A. Not unless I put it on the application for a job. I don't believe I did, no.

Trial Examiner: Where did you make out the application?

The Witness: At the employment office.

(Testimony of Morris A. Abolins.)

Trial Examiner: In Anchorage?

The Witness: Yes.

Q. (By Mr. Morrison): Mr. Abolins, as I understand, your first contact with Morrison-Knudsen was on June 11, a Monday, 1956?

A. Well, on June 10, we did see someone down there who told us to come back on June 11. But the first actual contact, as far as doing us any good in getting the job, was on the 11th, yes.

Q. On June 11, was that the time you saw the gray haired, heavy set gentleman, whose name you do not know? A. That's correct.

Q. And is it your testimony that this was the gentleman who called Mr. Groothias? A. Yes.

Q. Now, under what circumstances did he call Mr. Groothias? Did he ask you if you wanted them to call the union first? A. No, he did not.

Q. Did he discuss it with you at all?

A. He did not discuss it. He said to this effect, that in order to work up there we would have to join the union. [83]

Q. You say to that effect. Do you recall what he said?

A. I don't recall the exact words. It has been a year and three months now, but if he did not say those exact words, the intimation was unmistakable.

Trial Examiner: It was the sum and substance of what he said?

The Witness: Yes.

Q. (By Mr. Morrison): Did you at that time

(Testimony of Morris A. Abolins.)

advise them that you did not want to join the union?

A. No, I did not. I had no idea as to whether we had any choice.

Q. Did you inquire as to whether you had a choice?

A. No, I immediately assumed that we had to join the union to work up there.

Q. Did you at any time thereafter object to having to join the union or object to joining the union?

A. No, the only thing—actually, I did not, no.

Q. Had you ever done construction work before?

A. No.

Q. What type of duties were you assigned?

A. The regular laborer's duties, unloading barges, planes, digging ditches and cleaning up the camp.

Q. Digging ditches and unloading barges, you say? A. Yes.

Q. And at what location were you? [84]

A. Site No. 2, Big Mountain. It's on Lake Iliamna.

Q. How big is Lake Iliamna?

A. Oh, 90 by 30 miles, roughly.

Q. Did you work at all spots or just this one spot on site No. 2?

A. At one time, for a brief period of roughly two or three days, we did go over to a place they had established at Iliamna Bay. That's 15 miles

(Testimony of Morris A. Abolins.)

on the portage road from Pile Bay which is at the end of Lake Iliamna.

Q. That was two or three days? A. Yes.

Q. Then you also worked at the principal location of site 2 the rest of the time? A. Yes.

Q. Were there any other areas of activity to your knowledge in connection with site 2 and in the Lake Iliamna area at that time?

A. The only thing that we ever did, went anywhere else was, we used to go and pick up some loads of oil at a place called Igiugig.

Q. What was the installation there?

A. It was no installation. It is a place where they dumped off oil from another barge and we loaded it on our barge.

Q. Were there any buildings there?

A. Nothing in connection with the company. I believe they [85] had a civil air patrol or something out there.

Q. The CAA station? A. Yes.

Q. And it was a staging area or a location for supplies? A. Yes.

Q. Did you see these supplies being unloaded?

A. Not unloaded, no.

Q. Did you go out to Igiugig with any frequency? A. No.

Q. Did someone else go out there from site 2 insofar as you know? A. Frequently?

Q. Yes.

A. No, we only went out there about two or

(Testimony of Morris A. Abolins.)

three times, then we started getting our oil by other means.

Q. What other means?

A. I believe they brought in a large tanker. I really don't recall, but previous to that they had brought in a tanker barge which had oil in it. Rather than us going over and picking up drums, they brought the whole barge in.

Q. Where was the barge brought from?

A. Evidently by a river, up to Lake Iliamna from the ocean.

Q. Were you familiar with all of the operations going on in or around site 2 during the first two months of the time you were there, that is, June and July? [86]

A. What do you mean familiar?

Q. Well, did you know what was going on?

A. Substantially, yes.

Q. You mentioned this Iliamna Bay. You went up there once. What was your purpose for going there?

A. They had some supplies coming in up from Cooks Inlet up to Iliamna Bay and they would portage them across, tractors and other things, to Lake Iliamna from where they would have other barges take them to the site.

Q. When were you there?

A. Within the first three weeks of my stay at the site.

Q. In other words, from June 10 to sometime around July 1st? A. Yes.

(Testimony of Morris A. Abolins.)

Q. Now, that, you say, involved a portage from what you might call the water available from the outside across land to Lake Iliamna?

A. Exactly.

Q. How long was that used, if you know?

A. The portage road?

Q. Yes.

A. As far as I know, they were still using it when I left. I don't know.

Q. Were they using it when you got there?

A. The road was there when I got there, so I presume they did use it. [97]

Q. So that was an area of operation in connection with site 2 in which you were only present on two or three days and yet was in continuous operation as far as you know through the summer?

A. Yes.

Q. So you are not in a position to know who was hired where on Lake Iliamna except as to site 2, is that correct, where you actually worked?

A. To have firsthand knowledge, that is.

Q. You don't want us or the examiner to understand that you were fully familiar with where everyone was employed at site 2? A. No.

Q. So your testimony is what you observed at site 2? A. Yes.

Q. Your testimony was that there were no natives employed directly at site 2 until early August, was it? A. Yes.

Mr. Morrison: I have no further questions.

(Testimony of Morris A. Abolins.)

Cross-Examination

Q. (By Mr. Hartlieb): Mr. Abolins, did you pay your own transportation to Alaska?

A. Yes, I did.

Q. I don't remember if Mr. Latimer asked you this question. I don't remember your answer to it. Who did you talk to down [88] in the State of Washington about coming to Alaska?

Trial Examiner: A Mr. Wyley, who gets jobs for athletes, from the University of Washington.

Q. (By Mr. Hartlieb): Is he a Morrison-Knudsen official?

A. No, a University of Washington official.

Q. You didn't talk to any Morrison-Knudsen official prior to coming to Alaska? A. No.

Q. Now, you said you got here on June the 10th, which was a Sunday. You attempted to contact the Morrison-Knudsen offices but it was on Monday before you actually got to talk to someone, isn't that true? A. Yes.

Q. And that subsequently Mr. Groothias came up to the Morrison-Knudsen offices, was that your testimony? A. Yes.

Q. When Mr. Groothias came up to the offices of Morrison-Knudsen, who was present when he walked up to the group?

A. The gentleman we had been talking to previously.

Q. Whose name you do not know? A. Yes.

Q. And your three fellow college students?

A. Yes.

(Testimony of Morris A. Abolins.)

Q. Who opened up the conversation, sir?

A. You mean—— [89]

Q. (Interrupting): Between yourselves and Mr. Groothias.

A. That I do not recall. I believe we were introduced.

Trial Examiner: By whom?

The Witness: By the gentleman whose name I don't know.

Q. (By Mr. Hartlieb): You can't recall who started talking? A. No, I can't.

Q. Do you know who first started to talk about the union? A. You mean with Mr.——

Q. (Interrupting): I am talking about the conversation held in Morrison-Knudsen's office when Mr. Groothias was present.

A. No, I don't recall that.

Q. Was it at that time that he gave you application blanks, sir?

A. No, he took us into a vacant office which I mentioned before and there we signed the application blanks.

Q. Did he say anything to you at that time about having to join the union before you could go to work?

A. I cannot honestly say if he said those exact words, because all along I immediately assumed that we had to join the union.

Q. You assumed that, sir. I understand that, but I want to know if he made any sort of a statement.

(Testimony of Morris A. Abolins.)

A. Not that I recall that he said it, no.

Q. So you filled out the dispatch slip——

A. (Interrupting): Not the dispatch slip, no.

Q. The application? A. Yes.

Q. Did anyone pay Mr. Groothias any money at that time? A. I don't believe so.

Q. When did you, Mr. Abolins, agree to pay your dues in addition to your initiation fees?

A. I agreed to do that after talking it over with Mr. Alukas at the site. At the time, I had hoped that I would be working up here again this year and he convinced me that the dues for the winter months were negligible in comparison to the reinstatement dues if I were to just quit paying dues all at once and I could see that his reasoning had some merit, so I paid it.

Q. He didn't tell you that you had to pay those dues, though? A. Of course not.

Q. Nobody told you that? A. No.

Q. Now, you state that in a conversation held with Roy Ingram it was at the time Mr. Ingram was the job steward. How do you know that?

A. Because Mr. Alukas, for one, said that he was appointing him, designating him, appointing him as his successor as a job steward.

Q. You state that in your conversation with Mr. Ingram that you asked him if the natives belonged to the union? [91] A. Yes.

Q. What prompted that question? What was the background for that question?

A. Idle curiosity.

(Testimony of Morris A. Abolins.)

Q. Did they, in fact, belong to the union, do you know?

A. According to Mr. Ingram and anyone else that I happened to talk to, they did not.

Q. They did not? A. No.

Q. You don't like unions, do you, Mr. Abolins?

Mr. Latimer: I object to that. It is immaterial.

Trial Examiner: Overruled. You may answer.

The Witness: I don't like unions?

Q. (By Mr. Hartlieb): You don't——

A. (Interrupting): Why not?

Q. That's what I am asking you, sir.

A. Sure I do.

Q. You like the unions?

A. Yes, they have their place.

Mr. Hartlieb: I have no further questions.

Trial Examiner: Mr. Latimer, any questions?

Mr. Latimer: Yes.

Trial Examiner: All right, you will have your opportunity.

Redirect Examination

Q. (By Mr. Latimer): I believe you said that natives were [92] employed until early August. Did you mean on Big Mountain or by the company?

A. I mean just on the site where I was, just at Big Mountain. This doesn't include the whole of Iliamna Lake area.

Q. I believe you said you helped unload some barges? A. Yes.

Q. Where was that?

(Testimony of Morris A. Abolins.)

A. Well, we unloaded barges both at Iliamna Bay and at the site.

Q. Did you notice whether or not there were any natives working around at that time?

A. They used some natives part time at Iliamna Bay and they finally put one fellow on. They put him on full time, as I understand it.

Q. Do you know what his name was?

A. Gus somebody. I really don't know. I can't be sure of that.

Q. Well, did you know a native out there by the name of Anelon?

A. No, I didn't know any of the natives personally.

Q. You don't remember the names? A. No.

Q. So you don't know how many natives may have been employed as casual laborers just to work a day or two? A. No.

Mr. Morrison: That is a very grossly leading question. [93] If he wants to find out about what natives were employed, let's ask the company people, their personnel. This man is a fellow from the states and working out there for the summer.

Trial Examiner: I will sustain the objection.

Mr. Latimer: Mr. Examiner, may I be heard, plase? Counsel brought out the fact——

Trial Examiner (Interrupting): I know what counsel brought out. Your question is bad.

Q. (By Mr. Latimer): I will ask you this, Mr. Abolins. As I recall your testimony from Mr. Morrison, you testified that no natives were employed

(Testimony of Morris A. Abolins.)

until early August. Do you want to explain what you meant by that?

A. I meant that there were no natives on the site proper where I was working most of the summer, until early August.

Q. But there were natives—were the other natives employed for casual work——

A. (Interrupting): Yes.

Mr. Morrison: What is this casual work?

Trial Examiner: He said one a day work, a day or two. Go ahead.

The Witness: Part time.

Q. (By Mr. Latimer): I believe you said no one at the site told you you had to pay dues to the union, is that correct?

A. Nobody told me I had to pay dues for the whole year. I believe one of the other gentlemen asked me that. [94]

Q. But I think you testified earlier that Mr. Groothias told you if you didn't pay them he would be around to see you? A. Yes.

Trial Examiner: Any questions?

Mr. Morrison: I have a couple of areas I would like to cover.

Recross-Examination

Q. (By Mr. Morrison): Mr. Abolins, you state that your job was obtained through Mr. Wyley at the University of Washington?

A. Yes, that's right.

Q. What did he tell you about the job?

A. Well, he said that usually, that they had

(Testimony of Morris A. Abolins.)

had previous dealing with them and that the fellows who went up made quite a bit of money.

Q. What did he say to you about the availability of the job, if anything?

A. He said that we had jobs.

Q. That you did have jobs? A. Yes.

Q. That he had a commitment that the jobs would be available for you as an individual?

A. That was my understanding, yes.

Q. And so when you left Seattle you knew you had a job? A. Yes.

Q. Did you have any direct correspondence with the company other than through Mr. Wyley? [96]

A. No.

Q. Before you left Seattle?

A. No, I didn't.

Q. And when you checked in at Morrison-Knudsen, then, up here, you knew you had a job?

A. Yes.

Q. And was there any time in which there was any doubt in your own mind as to whether you did or did not have a job?

A. No, not that I recall, no.

Mr. Morrison: I have no further questions.

Recross-Examination

Q. (By Mr. Hartlieb): You have talked to Mr. Latimer about this case prior to this hearing, haven't you? A. Yes, sir.

Q. Were you ever told that you were going to receive any remuneration other than your witness fees as a possible outcome of this hearing?

(Testimony of Morris A. Abolins.)

Trial Examiner: You know the United States Government is not going to bribe a witness.

Mr. Hartlieb: That isn't bribery, Mr. Hearing Officer. I think whatever the results of the hearing, we're entitled to bring out.

Mr. Latimer: I object to the question.

Trial Examiner: Have you any ground for asking a question like that? [96]

Mr. Hartlieb: I think it goes to the credibility of the witness if he has a personal interest in it.

Trial Examiner: Could you think the U. S. Government is going to bribe a witness? I am asking you that question.

Mr. Hartlieb: No, sir, your Honor, I am not saying that.

Trial Examiner: Yes, you are, you are intimating it.

Mr. Morrison: I think counsel means there is an award rising in the due course of the decision. I don't think he has any reference to bribery.

Trial Examiner: Who is going to pay him, the United States Government?

Mr. Morrison: I think there is a possibility that——

Trial Examiner (Interrupting): Go on, ask another question.

Mr. Hartlieb: I have no further questions.

Mr. Latimer: No further questions.

Trial Examiner: You are excused.

(Witness excused.)

Mr. Latimer: May we take a short recess, sir?

Trial Examiner: All right. We will take a short recess.

(Short recess.) [97]

Trial Examiner: On the record.

Call your next witness.

Mr. Latimer: Mr. Crowe, will you come around please?

RONALD S. CROWE

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Ronald Crowe.

Trial Examiner: Mr. Crowe, where do you live?

The Witness: Puyallup, Washington.

Direct Examination

Q. (By Mr. Latimer): Mr. Crowe, did you work for the Morrison-Knudsen Construction Company during the summer of 1956?

A. Yes.

Q. When did you first come to Anchorage?

A. June 10, 1956.

Q. Was there anyone else with you?

A. Abolins, Garnes, and Bleeck.

Q. They were the three other university students that came up?

A. I just got out of high school; I wasn't a university student yet.

Q. What did you do when you first got to Anchorage?

A. We went down to the M-K office just in

(Testimony of Ronald S. Crowe.)

hopes that someone would be there. We didn't know exactly where we were going to in Anchorage. [98] There was a man who helped us and told us of a good motel to go to.

Q. You mean the man at the M-K office told you to come back Monday? A. Yes.

Q. Do you remember the date that you appeared there? A. June 10.

Q. 1956? A. Yes, sir.

Q. Did you go back to the M-K office on June 11, the next day? A. Yes.

Q. Who did you see at that time?

A. I believe the name is Haugen. He is a stocky, gray-haired guy; and I wouldn't swear that that was his name; but as I recall, I think that was the name.

Q. Did you have a conversation with him?

A. Yes.

Q. Who was present at that time?

A. Abolins, Garnes, and Bleeck.

Q. And about what time of day was this?

A. We got up there early. It may have been a quarter to nine.

Q. Give me your best recollection of everything Mr. Haugen said to you and everything that you, Bleeck, Abolins or Garnes said to him. [99]

A. He told us that he had been expecting us.

Q. Who is "he"?

A. Mr. Haugen. I am not positive of that, though.

Q. The man you talked to?

(Testimony of Ronald S. Crowe.)

A. The man we talked to, he said he had expected us, that we had jobs, that there were a couple of steps to go through and we would be sent out immediately. First, we would have to see the union, then to the M.K. employment office for dispatch.

Q. What happened after that?

A. He called Mr. Groothuis, and he came down to the M.K. office, and Mr. Groothuis said——

Q. (Interrupting) Who is Mr. Groothuis?

A. The business agent for Local Union 341.

Q. Do you see him in the hall at the present time? A. Yes.

Q. Would you stand up, Mr. Groothuis?

Is that the gentleman you are referring to?

A. Yes.

Q. What happened then?

A. Mr. Groothuis and the four of us went back to this vacant M.K. office, I believe that was where he had the cards; and we were to fill them out. We didn't fill them out. He filled them out for us, and he explained to us the union's side of our working and how the dues were and all that. He also said [100] there would be this very big exception, or that he not very often went down to the M.K. office to do his talking; as a rule, the men that wanted to join the union came to the union hall. I was also under the assumption that I would have to join the union. I never realized anything different.

Q. Will you look at General Counsel's exhibit No. 6 and examine that? Does that look like the sort

(Testimony of Ronald S. Crowe.)

of application you filled out for Mr. Groothuis at that time? A. Yes, it does.

Q. After you filled out your application for membership in the union, what happened? Did you pay your dues at that time?

A. No, we didn't have the money at the time; and we asked if we could pay it perhaps a little later, because we just didn't have the money; and so he said, he wasn't really hot for it, but he said that would be all right.

Q. Did he say what would happen to you if you didn't pay?

A. As I recall, this was about fifteen months ago, or something, one of the guys said, kind of in a joking way, "what if we don't pay"; and I think Mr. Groothuis said, "Well, then, I will be out after you."

Q. After you finished your conference with Mr. Groothuis, what did you do?

A. We went to the, he drove us to the M.K. employment office where nothing much happened, as I recall. I just told Mr. Wargny that—— [101]

Q. (Interrupting) Who did you see there?

A. Mr. Wargny. And we told him that we were kind of anxious to get out; and so he said he had to figure out where we would be sent. And he called us. He had everything ready, told us where we were going to be sent.

Q. Where were you sent?

A. Cape Romanzoff.

(Testimony of Ronald S. Crowe.)

Q. Did the union supply you with a dispatch slip?

A. No, I believe one of Mr. Wargny's assistants drove us to the union to pick up our dispatch slips.

Q. When was this?

A. After Mr. Wargny had called us to come back to the employment office so he could tell us where we were going and give us our buttons.

Q. Who did you see at the union hall?

A. I don't remember, someone that had a dispatch slip.

Q. Did you receive a dispatch slip?

A. Yes.

Q. Can you describe it?

A. It was a small card like, it was a small paper that told us——

Q. (Interrupting) How many copies did you get? A. Two.

Q. Both the same color?

A. One was yellow and one was white. [102]

Q. Were you told to do anything with those slips?

A. I was to give one to the site superintendent as I got off the plane so they would be correct in who they were sending out.

Q. I show you what has been marked for identification as General Counsel's Exhibit No. 2, and ask if you can tell me what that is.

A. That's the dispatch slip.

Q. That's a photostatic copy of the dispatch slip you received from the union on June 11, 1956?

(Testimony of Ronald S. Crowe.)

A. Yes.

Mr. Latimer: I offer it in evidence, Mr. Examiner.

Trial Examiner: Any objection?

Mr. Morrison: No objection.

Mr. Hartlieb: No objection.

Trial Examiner: There being no objection, the paper will be received in evidence; and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 2.

(The document heretofore marked General Counsel's Exhibit No. 2 for identification was received in evidence.)

Q. (By Mr. Latimer): Did Mr. Groothuis tell you how much the union fees would be?

A. Yes, he made it very clear. $50.00 for the initiation fee, $6.00 for the summer months. [103]

Q. And where did you report to duty, what site?

A. Site 5, Cape Romanzoff.

Q. Who did you see when you got to site 5?

A. The first person we saw was the site superintendent, Rowan Robinson, and he immediately sent me to the labor foreman, who was Lowney. However, they didn't exactly need laborers at that time, so they sent me to wash dishes. The first three weeks I was a cook's helper. But I was receiving laborer's wages, which was three forty-eight; and the head cook, who was my immediate supervisor, was receiving two forty, and it was a little unpleasant.

(Testimony of Ronald S. Crowe.)

Q. What did you do with your yellow dispatch slip?

A. I gave that to the superintendent.

Q. Superintendent?

A. I believe, the dispatch to Romanzoff.

Q. You turned your white slip in to the employment office, did you not?

A. One of them went to the employment office, I don't remember which color went where, but one went to the site superintendent, as I recall.

Q. Did anyone from Local 341 contact you out at the job site?

A. Because I was washing dishes, the shop steward was Don Kent, he didn't realize immediately that I was a laborer, and it wasn't until about a week later that someone told him I [104] was, and he asked me if I was a laborer, and I said yes. He wanted all the questions about dues, and I told him I would be sure and pay him and all that. He told me I should get paid up, and that stuff, so I did.

Q. Did you later pay your initiation fees and dues? A. Yes.

Q. Do you remember when that was?

A. Around the 16th, 15th of June.

Q. How did you pay it? A. By check.

Mr. Latimer: Will you mark this, please?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 9-a & 9-b for identification.)

Q. (By Mr. Latimer): I show you what has

(Testimony of Ronald S. Crowe.)

been marked for identification as General Counsel's Exhibit No. 9, 9-a, and ask if you can identify that.

A. Yes.

Q. What is that?

A. That's the check I wrote to the union to pay for the initiation and first three months.

Q. I show you General Counsel's Exhibit No. 9-b, and ask if you can identify that.

A. That was the check I wrote after I had come home. I wanted to work next year, and that was to cover the winter [105] dues.

Q. So you paid one check of $68.00 and one of $30.00.

Mr. Latimer: I offer them in evidence, Mr. Examiner. I do not have a duplicate. If it is necessary, I will have them photostated.

Trial Examiner: Any objection?

Mr. Morrison: No objection.

Mr. Hartlieb: No objection.

Trial Examiner: There being no objection, the papers will be received in evidence; and I will ask the reporter to kindly mark them General Counsel's Exhibits 9-a and 9-b, respectively.

Do you want these checks back?

The Witness: No. You can give them back to me, I don't care.

Mr. Latimer: May I suggest, Mr. Examiner, I read them into the record and give them back to him?

The Witness: It doesn't matter to me one bit, I don't think.

(Testimony of Ronald S. Crowe.)

Trial Examiner: If he doesn't want them back, you will have to get duplicates.

(The documents heretofore marked General Counsel's Exhibits Nos. 9-a and 9-b for identification were received in evidence.)

Mr. Latimer: You may inquire.

Trial Examiner: Mr. Morrison.

Cross Examination [106]

Q. (By Mr. Morrison): Mr. Crowe, you received your job commitment through Mr. Wyley at the University of Washington? A. Yes.

Q. How did you happen to be in contact with Mr. Wyley?

A. The first person I came in contact with regarding a job was Mr. Dye, the basketball coach, asked me one day, they took me out, up to the university and the coach asked me how I would like to work in Alaska. I said I would, and he said he was very confident that he could get me a job, he and Mr. Wyley, they worked together, and he did all the arranging for us, and we went up.

Q. How did Mr. Dye happen to take this interest in you?

A. I got a basketball scholarship at the University, I still do. They do stuff like that.

Q. In other words, it was part of the consideration of getting you to select the University of Washington as the school that you were going to and accept their basketball scholarship. You were appar-

(Testimony of Ronald S. Crowe.)

ently a good ball player in high school and you got letters. A. Yes.

Q. And you expect——

Trial Examiner (interrupting): Let's not go into that.

Mr. Morrison: I think it is material.

Trial Examiner: What has that got to do with the issues?

Mr. Morrison: To their statement that they thought they [107] had to join the union.

Q. (By Mr. Morrison): Now, when you left Washington to come to Anchorage, I believe you stated that you knew you had a job.

A. Yes, sir.

Q. And when you checked in and saw a person whom you believe to be Mr. Haugen, you were then advised that you had a job? A. Yes.

Q. Mr. Haugen advised you that you would have to be dispatched from the M.K. office, and that you would have to check with the union?

A. That's right.

Q. Did he advise you that you had to join the union?

A. Mr. Haugen, he said that that would be part of the steps in getting out right away, to see the union.

Q. To see the union is what he said?

A. I don't know what he said exactly. He said one of the first steps would be to go through the union and then through the dispatch.

(Testimony of Ronald S. Crowe.)

Q. Did Mr. Haugen say that if you did not join the union you would not have your job?

A. He didn't say that. I was——

Q. (Interrupting) Did anyone of M.K. say that to you? A. No, it was never asked.

Q. And you never asked whether you had to join the union or [108] not?

A. No, I just wanted to get out to the job. I was very pleased with everything.

Q. So that all that happened was that the union representative came down and talked to you?

A. Yes.

Q. And it was through his conversation with you that you signed up your application, made all your arrangements? A. Yes.

Mr. Morrison: I have no further questions.

Trial Examiner: Mr. Hartlieb?

Mr. Hartlieb: I have no questions.

Mr. Latimer: Redirect.

Redirect Examination

Q. (By Mr. Latimer): You were given to understand that you had to join the union in order to work up there?

Mr. Morrison: I object. He is leading.

Trial Examiner: I will sustain the objection.

Mr. Latimer: I will withdraw the question.

The Witness: I figured the reason we were going to get this three forty an hour was because the union had set up those standards. I had no objection to

(Testimony of Ronald S. Crowe.)

joining, I never questioned that I had to, or anything like that.

Mr. Latimer: That's all.

Trial Examiner: Any questions? [109]

Mr. Morrison: I have no further questions.

(Witness excused.)

Mr. Latimer: I will call Mr. Garnes.

JOEL I. GARNES

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Joel I. Garnes.

Trial Examiner: Where do you live, sir?

The Witness: 315 Ninth Avenue South, Yakima, Washington.

Direct Examination

Q. (By Mr. Latimer): Were you one of the students that came up here in 1956 to work for Morrison-Knudsen Company?

A. Yes, I was.

Q. You have heard the testimony of Mr. Crowe and Mr. Abolins as to how their jobs were secured. Was your job secured substantially the same way?

A. Yes, it was.

Q. What did you do when you first got into Anchorage?

A. We tried to call the M.K. office, but we

(Testimony of Joel I. Garnes.)

couldn't get an answer. Then we met this guy, and he took us out to the office, and we then saw an agent out there, and he said there was nobody there and he didn't know how to get in touch with them, and we should come back the next morning about 8 o'clock.

Q. Do you remember what day this was on?

A. The tenth of June, 1956.

Q. So you came back the following morning, which was Monday, June 11, to the M.K. office?

A. Yes.

Q. Who did you see at that time?

A. I think it was Mr. Haugen.

Q. Do you see Mr. Haugen in the room here now? A. No, I don't.

Q. Would you recognize him if you saw him?

A. I don't think so, I didn't look at him very good.

Q. Did you have a conversation with him?

A. He talked to us a little bit about school and everything, and then he said that we would have to join the union before we could work, and he would call Mr. Groothuis to come over.

Q. Were you present when he called Mr. Groothuis?

A. No, we were in the outer office.

Q. What happened after that?

A. We went across the yard to another office.

Q. Who took you to the other office?

A. Mr. Haugen after he called Mr. Groothuis. He asked any of us if we were road men. Since none

(Testimony of Joel I. Garnes.)

of us knew what it was, we said no. And so we stood around for a little while, and Mr. Groothuis came and talked to Mr. Haugen for a few minutes, and then we found an empty desk and started filling out the form for the union. [111]

Q. Would you recognize Mr. Groothuis if you saw him again? A. Yes.

Q. Could you point him out in the hall here?

A. He is in the plaid shirt back there.

Q. When you said you went back to an unoccupied office, what happened back there?

A. We just filled the papers out and he explained to us about the dues and initiation fee. And after I filled my paper out, I told him I didn't have enough money, and he said well, that you could ask them at the site to split your check, and you could send it to the union office. But as it turned out, they wouldn't split the check for me at the office, so I had my parents send him a check.

Q. You said you were filling out papers. I show you General Counsel's Exhibit No. 6 and ask if you can identify that.

A. Yes, this is the blank we filled out, or he filled out for us, when we joined the union.

Q. Did you sign a blank similar to that?

A. Yes.

Q. Did Mr. Groothuis tell you what the dues would be?

A. $50.00 for the initiation fee, $6.00 a month for the construction season, and I think he said $2.00 for non-construction season.

(Testimony of Joel I. Garnes.)

Q. When Mr. Groothuis first appeared at the office, do you remember what he did at that time after Mr. Haugen had called [112] him?

A. No, I don't.

Q. Did he talk to you immediately, or did he talk to somebody else?

A. He talked to Mr. Haugen first.

Q. Before he talked to you? A. Yes.

Q. After you filled out your application for the union, what did you do?

A. Well, Mr. Groothuis consented to take us over to this other office, personnel office, that was way back to town, so he took us over there.

Q. Who did you see over there?

A. We went to a quonset hut that was outside the personnel office and we filled out some applications for work. Then we waited around. Mr. Wargny came out and talked to us for a few minutes, and then he said to go back to the motel and he would call us when he wanted to see us.

Q. I show you General Counsel's Exhibit 4, and ask you to look at that. Tell me whether or not that looks like the application, type of application, you filled out at the personnel office.

A. Yes, it does.

Q. Then you went back to the motel after you had talked to Mr. Wargny? [113] A. Yes.

Q. What happened next?

A. He said he would call us about 3 o'clock in the afternoon, and he called us and told us to come back, that they knew where we were going to go.

(Testimony of Joel I. Garnes.)

When we got back there, we got to talking, I forget who it was, and they said we would have to go down to the union to get our dispatch slips, and one of Mr. Wargny's assistants took us down to the union hall, and Mr. Groothuis gave us our dispatch slips.

Q. What did you do with your dispatch slips?

A. I gave the white one to the personnel office and the yellow one I was supposed to give to the shop steward on the job, but there wasn't one, so I just kept the yellow one.

Mr. Latimer: Mr. Reporter, will you mark this as General Counsel's Exhibit No. 10, please?

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 10 for identification.)

Q. (By Mr. Latimer): I show you what has been marked for identification as General Counsel's Exhibit 10, and ask if you can identify that.

A. That is a copy of the dispatch slip.

Q. And the yellow copy is the copy that was given to you?

A. This yellow copy is the one that was given to me by Mr. Groothuis. [114]

Mr. Latimer: I offer them in evidence.

Trial Examiner: Any objection?

Mr. Morrison: No objection, Mr. Examiner.

Trial Examiner: There being no objections, the paper is received in evidence; and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 10.

(Testimony of Joel I. Garnes.)

(The document heretofore marked General Counsel's Exhibit No. 10 for identification was received in evidence.)

Q. (By Mr. Latimer): Now, what site were you dispatched to by the employment office?

A. Site 4, Cape Newenham.

Q. What did you do after you got up there?

A. Well, we got there, it was early in the morning, so they just assigned us beds and told us to report to the site clerk the next morning.

Q. Was it after you reported to the site that you took up with the site clerk about splitting your check so that you could pay your union dues and fees? A. Yes, it was.

Q. Do you remember who you talked to up there? A. It was a Mr. Potter.

Q. Who was Mr. Potter?

A. Mr. Potter was the site clerk at the time.

Q. And he told you you couldn't split your check up?

A. He said it wasn't a standard practice and he couldn't [115] make any exceptions because everybody would want it.

Q. Did you ever pay your initiation dues and fees?

A. My folks sent it up to Mr. Groothuis by check.

Q. Did you ever receive a book or receipt for it?

A. I never received a receipt or anything while

(Testimony of Joel I. Garnes.)

I was up here. About two months after I got back to school I wrote Mr. Groothuis for a letter and asked him for a union book, and they finally sent it down to me.

Q. Do you have it with you?

A. No, I don't.

Q. Was there a job steward on site 4 when you reported up there?

A. There wasn't for about a month afterwards. Mr. Groothuis came to visit the site one day and he appointed Otto Smith as shop steward.

Q. How long did you stay on site 4?

A. About ten weeks.

Q. Then what happened?

A. Then I left. I was going back to school.

Mr. Latimer: Your witness.

Cross Examination

Q. (By Mr. Morrison): Mr. Garnes, you are also a basketball player? A. No, football.

Q. Who arranged for your job? [116]

A. Mr. Wyley.

Q. Anyone else? A. No, just Mr. Wyley.

Q. Mr. Wyley was the only one at the University that said anything about it?

A. We asked the coaches and they also referred us to Mr. Wyley.

Q. Mr. Wyley advised you you had a job commitment with Morrison-Knudsen in Anchorage?

(Testimony of Joel I. Garnes.)

A. He said there was a lot of work in Alaska, to come back the next day and he would tell me about it.

Q. When you left Seattle to come to Anchorage, you had a job commitment? A. Yes, I did.

Q. Was there ever any question in your mind as to having that job?

A. Never any question.

Q. Mr. Crowe mentioned that he did not recall anyone telling them they had to join the union, that Mr. Haugen advised that he check with the union. Does your recollection differ from Mr. Crowe's?

A. I am quite sure Mr. Haugen said we had to join the union before we could go to work.

Q. Did you question that?

A. No, I didn't. [117]

Q. Did anyone else ever tell you that there was any condition other than Mr. Haugen, about your going to work? A. No.

Q. Did you have any direct contact with Morrison-Knudsen before you arrived here on June 10?

A. No.

Q. Had Mr. Wyley mentioned anything about joining a union? A. I can't remember.

Q. Did you ask Mr. Haugen if you had to join a union?

A. No, he just told us we had to.

Q. What did he say?

(Testimony of Joel I. Garnes.)

A. He said we had to join the union before we could go to work.

Q. Are you sure he didn't say that you ought to check with the union?

A. No, he didn't say anything like that.

Q. Did he ask you if you wanted to join the union?

A. No, he didn't ask us if we wanted to.

Q. Did you ask Mr. Groothuis whether you had to join the union? A. No, I didn't.

Q. You had signed the application blank before you saw Mr. Wargny, is that correct? You first saw Mr. Haugen, and then you saw Mr. Groothuis at the same office as you saw Mr. Haugen?

A. It was in the same place, yes. [118]

Q. And then it was after you signed the application blank and made your arrangements with Mr. Groothuis that you saw Mr. Wargny. Is that correct? A. Yes.

Q. When you advised Mr. Wargny that you had been cleared by the union, did you then have your dispatch slip?

A. No, Mr. Wargny sent us down to get our dispatch slips.

Q. Did you advise Mr. Wargny that you had already made your arrangements with Mr. Groothuis? A. No, we didn't.

Mr. Morrison: I have no further questions.

(Testimony of Joel I. Garnes.)

Cross Examination

Q. (By Mr. Hartlieb): Did Mr. Wargny ask you if you had made your arrangements with Mr. Groothuis? A. I don't think so.

Q. When Mr. Groothuis came to M.K.'s office on June 11, at the time you have testified to here before, do you remember who opened up the conversation after you were introduced?

A. No, I don't.

Q. Do you remember who first started to talk about the union?

A. I think one of the boys asked him about the dues and fees.

Q. That was how the union was brought up. Is that your testimony? A. Yes.

Q. Did Mr. Groothuis tell you that you had to join the union [119] before you could go to work?

A. No.

Mr. Hartlieb: I have no further questions.

Mr. Latimer: No further questions.

Mr. Morrison: No questions.

Trial Examiner: You are excused, sir; and thank you very kindly.

(Witness excused.)

Mr. Latimer: I will call Mr. Brady.

Trial Examiner: Will you step forward, sir, and be sworn?

SEAN BRADY

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Sean Brady.

Trial Examiner: And where do you live, sir?

The Witness: 1238 Fifteenth Avenue, Anchorage.

Trial Examiner: You may be seated, sir.

Mr. Latimer, you may proceed with the examination of Mr. Brady, who has been duly sworn.

Direct Examination

Q. (By Mr. Latimer): Did you ever work for Morrison-Knudsen Company? A. Yes, I did.

Q. When did you start working for them? [120]

A. July 11-February 27, 1952, originally.

Q. Did you ever work for them in Anchorage?

A. Yes, sir, I did.

Q. When were you with them in Anchorage?

A. July 11, 1955, to June 25, 1956.

Q. What was your job in Anchorage?

A. I was in two departments. My original assignment was in the transportation department, and I later joined the personnel department.

Q. When did you go into personnel?

A. I think it was September of 1955. Late August or early September.

Trial Examiner: You mean that's your best recollection at the present time?

The Witness: Yes, sir, that's accurate within a month, I believe.

(Testimony of Sean Brady.)

Q. (By Mr. Latimer): What was your job in the personnel office at that time?

A. Assistant to the personnel manager.

Q. Who was the personnel manager at that time?

A. There were two of them. The personnel manager was John Chandler at the time I joined; and then I was acting personnel manager for a couple of months; and Mr. Wargny joined us in March, '56, I believe.

Q. Did you take your personnel training in your office here [121] under Mr. John Chandler, did he train you in the company policy?

A. In this particular phase for the contract he did, yes, sir.

Q. As assistant personnel manager under Mr. Chandler, what were your duties?

A. My duties were mainly to assist him during the heavy season in recruiting, reviewing applications, interviewing personnel, and assisting in general clerical duties in the department.

Q. Now, did you have anything to do with procuring personnel for the White Alice Project, particularly site 2 of the White Alice Project?

A. Yes, I did.

Q. Can you give us your best recollection of how laborers were recruited and processed in the personnel office during the spring and summer of 1956?

A. The call for help usually came in by our M.K. radio network and the message was relayed to the personnel department to fill whatever vacancies were needed, truck drivers, laborers, oilers, and

(Testimony of Sean Brady.)

what have you. The messages usually stated, need four laborers and two heavy duty mechanics by such and such a date. At that point we would call the particular craft involved and request the number of personnel and advise the union as to the time that they were required on the job site. [122] The men were later dispatched to us where they were processed in the department——

Q. (Interrupting) Who dispatched them to you?

A. The union. Then they were processed in our department. Transportation was arranged and they were dispatched to the site.

Q. Well, now, let's take a hypothetical case. Suppose you got a radio from the superintendent at site No. 2 requesting ten laborers and he would name five individuals whom he wanted, five out of ten, what would you do in a case like that?

Mr. Morrison: I object unless there is some case where that actually occurred.

Trial Examiner: Mr. Wargny did say it occurred.

Mr. Latimer: I will withdraw the question.

Q. (By Mr. Latimer): Did there come a time when you were ever requested to furnish common laborers by name for the job site?

A. Yes, sir. This happened frequently, I believe; but it was an understandable thing. We had some of our top people up here, and as they took these new assignments under contract 1787, they desired to have certain hand-picked men. It was understandable.

(Testimony of Sean Brady.)

Q. Now, let's assume that——

Trial Examiner (interrupting): Don't ask him assumptions. Ask him if things happened. [123]

Q. (By Mr. Latimer): If the site superintendent at site No. 2 sent a radio dispatch and asked for ten laborers and five named laborers, what would you do about it?

A. If they specifically asked for five laborers by name, we would make every effort to obtain them.

Q. How would you obtain them?

A. We would refer the request to the pertinent union involved and ask that five laborers be dispatched plus five John Does, or specifically the names.

Q. Let's be more specific. Laborers, you would call Local 341, would you not?

A. That's right.

Q. And ask for these five named laborers.

A. That's right.

Q. Did they always furnish these named laborers for you? A. If they were available.

Q. What if they weren't available?

A. We would take substitutes.

Q. Do you recall any instances when Local 341 refused a named request?

A. It was when a man had had a previous bad record and we expected, the business agent here in Anchorage worked with us and advised us where we had a named request and the man was likely to cause trouble at the station, had a past history of heavy drinking, and we expected the business

(Testimony of Sean Brady.)

agents to tell us, [124] and we usually took their recommendations.

Q. Do you recall any occasions when Local 341 refused to send you a particular person that you had requested other than that?

A. Outside of that, no, sir.

Q. Do you recall any occasions where you requested a man who was not in good standing with the union?

A. Do you mean did I ever have prior knowledge that I was requesting a man——

Q. (Interrupting) I mean did you ever request a man from the union and the union told you he was not in good standing, did you ever have any experience of that sort?

A. Yes, I believe we have.

Q. What would happen in a situation like that?

A. Specifically, if we called and asked for a man and we were told by the business agent that this man was arrear in his dues, usually this didn't happen too often, but I can remember a case where the man came to my office and talked to me and told me that he was wanted at the job site and I suggested that he make arrangements with the union to obtain a dispatch. What their arrangements were with the union, I don't know, I didn't care, except that it was our practice to obtain these men with dispatches.

Q. And on that occasion did he go back to the union and get a dispatch slip? [125]

A. I can't specifically remember a case where

(Testimony of Sean Brady.)

this whole cycle took place or not, but I do remember talking to one in particular, I don't know whether he went back to the hall and got himself——

Trial Examiner (interrupting): Did you put him to work?

The Witness: I don't recall, sir.

Q. (By Mr. Latimer): Do you recall any instance when the union asked to substitute someone else when you asked for a named person?

A. I can't specifically recall that. There were instances of this happening, both on the other end and on our end. I can recall on occasion having called and a business agent would have somebody who was in dire need of work, who had been on the bench for a long time, and would ask, instead of a named request, would we accept so and so. And, of course, my job was to keep the site satisfied, so we tried to get the named requests whenever possible.

Q. Do you know of any practices that was engaged in by Morrison-Knudsen Company and the union as to the percentages or the number of named personnel you could request?

A. There certainly was nothing ever written or was I ever instructed. Our policy, as I understood it, in the department was that we would cooperate with the various unions so that they could meet their obligations to the membership. In other words, they had fifty, one hundred, two hundred people out of [126] work, and they had an obligation, a moral obligation, I felt, to send these people

(Testimony of Sean Brady.)

out in the order of their, the period of time that they had been out of work, and I didn't feel it fair that we should, it was our policy we didn't feel it fair to continually ask for every man by name. So we tried to cooperate by keeping some of our named requests down to a minimum.

Q. Do you recall any occasions when the job, the site superintendent wanted to hire people locally? What would happen in a case like that?

A. There were local hires made at the stations quite frequently. I have no idea of the frequency, but I do know that local people were employed.

Q. Let's take the site superintendent at Big Mountain. If he wanted to hire some local natives, what would he do about it?

A. I can't vouch for the procedure that took place at the site. I believe there were many times when casual temporary laborers were needed at the station, laborers were put on the payroll on a temporary basis. If a man were needed at the station, if a local native was going to be hired on a permanent basis, the site superintendent would, in accordance with our company procedure, radio in and request permission to hire this man. And if the man was desired as a laborer, we would call Local here in Anchorage and tell them that we were going to hire this man as a laborer in Big Mountain, for example. [127]

Q. Do you mean Local 341?

A. Call them and tell them we were going to

(Testimony of Sean Brady.)

hire this man and they would record his name, or whatever they actually have to do.

Q. But you always cleared with Local 341 before you——

Mr. Morrison (interrupting): He didn't say clear, he said he advised them.

The Witness: We notified them, the pertinent local, of the fact that we were going to hire or had hired.

Q. (By Mr. Latimer): Was there ever any objection on the part of Local 341 to that procedure?

A. No, sir.

Q. Why do you notify the locals that you are going to hire laborers out at Big Mountain?

A. To be frank with you, I don't fully know why the union wanted to know, except that it was an agreement. I don't know whether I was present when the agreement was made, but it was an understanding when I came into the department that where natives or local hires were made at the outlying stations, that we would advise the union as soon as practical, the hiring we had done, social security number, and so forth.

Q. Do you recall at any time the union objected to anyone you hired on the site?

A. No, sir, never.

Q. Do you recall whether or not you had an understanding or [128] practice with the union that you could hire a certain percentage of local people or natives at the site?

A. No, sir, there was never any ratio established.

(Testimony of Sean Brady.)

Q. Do you know whether or not the site superintendent had to check with the job steward at the site before he hired any native poeple?

A. I don't know whether that was done or not. I can't comment on it.

Q. Did you ever have an occasion to ask the union for a temporary permit for someone to work?

A. I don't believe so.

Q. Do you know what the policy of Morrison-Knudsen was during the spring and summer of 1956 as to hiring local people, natives and local residents in the area of the job site?

A. What the policy was at that time?

Q. Yes.

A. I think the policy, to my knowledge, was never changed. It was constant from the time I joined until the time I left the company. I believe the company had a feeling that we had a moral obligation to the people who were living in the vicinity of the stations and we would try to offer them employment where possible; and as far as I can determine and to the best of my recollection, that has always been. I will say this, it was the policy of the company when I was in the personnel department. [129]

Q. In your knowledge of what happened at Big Mountain during the spring and summer of 1956 where the local people in the vicinity of Big Mountain were hired as casuals, were they hired as casuals or for the entire season?

A. I know for a fact that many were hired at

(Testimony of Sean Brady.)

frequent times for casual employees. I don't know of any that were employed as permanent employees. I have no knowledge of that.

Q. You say it was a company policy to hire local people and natives where practical to do so. Do you know whether anyone of the company had discussed that matter with Local 341 or not?

A. I don't believe so, sir. Matters of that nature were handled by Mr. Erickson, policy matters.

Q. Now, what would you do when a person would appear at the employment office, applying for a job as a common laborer, what would you tell him?

A. In the beginning we tried to be very fair and impartial about applications in unskilled labor. We took applications for many, many months, and finally the office became so overrun with several hundred applications that we finally stopped applications. However, we never refused to talk to a man. I mean unless there was somebody in the office and we weren't physically able to see him. A man was always given a chance to come in and talk to somebody about a job; and, of course, the overflow of labor in Anchorage at that time, and I guess it still exists today. We talked to a man, we would tell him [130] that, as usually was the case, that there just wasn't any employment available, and at the time we were taking applications, grade the applications, and place it in the file for future reference.

Q. Did you ever tell any of these casual appli-

(Testimony of Sean Brady.)

cants where you were obtaining, how you were obtaining your labor?

A. No, sir. I suppose I have on occasion. I don't recall specifically.

Trial Examiner: Did you ever take an application, written application from anyone applying for a job, say, in the spring and summer of 1956?

The Witness: Yes, sir, many of them.

Trial Examiner: And did they usually fill out the full application.

The Witness: We tried to make sure that they were filled out; however, many of them weren't.

Trial Examiner: But if a person did not fill in the name of the labor organization with which he was affiliated, what would you do or say, if anything?

The Witness: Usually the applications, sir, were filled out. We had such a tremendous amount of traffic in and out of the department, usually the applications were filled out and left for us to grade and review. If a man had a particular problem, or point, or question, he was given an interview and talked to. [131]

Trial Examiner: If an applicant did not fill in that portion of the application, how would you grade the application?

The Witness: It would be graded solely on the basis of his work history on the reverse side of the application and placed in the file.

Trial Examiner: And if he didn't fill out that

(Testimony of Sean Brady.)

question, then you made no point of it. Is that right?

The Witness: None whatsoever.

Q. (By Mr. Latimer): Did you ever hire anybody as a common laborer who applied at the office, directly? A. Yes, sir, I have.

Q. When you hired him, what did you tell him to do?

A. As was our practice, we always routed our people through the halls with dispatch slips. If a man came directly to us, this was an exception rather than the rule, I have had hard luck stories come in the office, and felt sorry for somebody, and been reasonably convinced that the man needed help, I would call the hall and tell them that this man would be coming down and that we would like to have a dispatch slip issued to him.

Q. So you would process him through the union hall before you would actually send him to the job. Is that correct? A. Yes.

Mr. Latimer: Your witness. [132]

Trial Examiner: Do you want a few minutes to go over your notes, Mr. Morrison?

Mr. Morrison: If I may, Mr. Examiner.

Trial Examiner: Very well, we will take a short recess.

(Short recess.)

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Morrison: Yes, sir.

(Testimony of Sean Brady.)

Trial Examiner: Will you kindly resume the witness stand, Mr. Brady?

Mr. Morrison: I have no questions of Mr. Brady.

Mr. Hartlieb, have you any questions?

Mr. Hartlieb: I have one or two.

Cross Examination

Q. (By Mr. Hartlieb): Mr. Brady, during the period of question, to your knowledge, did Local 341 ever request through your office that a man be laid off for not belonging to the union?

A. No, sir, that has never occurred.

Mr. Hartlieb: I have no further questions.

Mr. Latimer: No questions.

Trial Examiner: Will you call your next witness?

Mr. Latimer: I have no other witnesses now until tomorrow.

Trial Examiner: We will stand adjourned now until 10 o'clock tomorrow morning. [133]

(Whereupon, at 4:00 o'clock p.m., Monday, September 9, 1957, the hearing was adjourned until tomorrow, Tuesday, September 10, 1957, at 10:00 o'clock, a.m.) [134]

Tuesday, September 10, 1957

Proceedings

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Morrison: Yes.

Mr. Hartlieb: Yes.

Mr. Latimer: Mr. Examiner, I expected to have a witness here this morning who was flying up from Yakataga last night. I checked in with the airlines this morning and the flight last night was cancelled because of weather conditions. The next flight is due to arrive in around 7 o'clock this evening. He was my last witness and I have no further witnesses at this time and I would suggest we go off the record for a moment so I can discuss with counsel the procedure.

Trial Examiner: Very well, off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Are you ready to proceed, gentlemen?

Mr. Latimer: Yes, sir.

Mr. Examiner, as I explained earlier, Mr. Wyman one of my witnesses coming up from Yakataga was unable to get here last night because the plane in which he was coming up on, the flight was cancelled on account of weather. I have sent Mr. Wyman a telegram asking him to disregard the subpoena because I feel that his testimony would simply be corroborative of the testimony of Crowe, Abolins and Garnes.

In view of the circumstances, I also wired the charging [137] party, Mr. Moore, down at Kakhanok Bay that the hearing would open at Big Mountain tomorrow, and I would suggest that we recess at this time, or adjourn rather at this time, to Big Mountain, where we may resume tomorrow morning.

Trial Examiner: And Mr. Hartlieb and Mr.

Morrison have returned to their respective headquarters and they have consented to the change of hearing place.

The hearing therefore will recess now until tomorrow morning at 10 o'clock in Big Mountain.

(Whereupon at 11 o'clock a.m. Tuesday, September 10, 1957, the hearing was adjourned until tomorrow, Wednesday, September 11, 1957, at 10 o'clock a.m., in Big Mountain, Alaska.) [138]

Wednesday, September 11, 1957

Proceedings

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Latimer: Yes, sir.

Trial Examiner: Will the General Counsel kindly call his next witness.

Mr. Latimer: Mr. Moore, will you take the stand, please?

Trial Examiner: Will you step forward, sir, and be sworn?

DENTON MOORE

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name?

The Witness: Denton Moore.

Trial Examiner: Spell your name for the record.

(Testimony of Denton Moore.)

The Witness: M-o-o-r-e.

Trial Examiner: Where do you live?

The Witness: Kakhanok Bay.

Trial Examiner: You may be seated, sir.

Mr. Latimer you may proceed with examination of Mr. Moore.

Q. (By Mr. Latimer): What is your occupation?

A. A commercial fisherman and I am a homesteader and I guess that's about it.

Q. How long have you been in Alaska?

A. Approximately ten years.

Q. During the spring of 1955 did you have an occasion to go [141] to Big Mountain and talk to some of the supervisory personnel of Morrison-Knudsen up there? A. That was in '56?

Q. I mean '56. A. Yes, I did.

Q. Can you tell us about when that was?

A. In April.

Q. April, '56? A. Yes, sir.

Q. Who accompanied you up there?

A. We were in Oral Hudsen's airplane and that was just the two of us in the plane. We flew over a number of dog teams that were headed down here the same day.

Q. Did you go up there alone at that time?

A. Yes.

Q. Did you have a conversation with some of the supervisory personnel of Morrison-Knudsen up there at that time?

A. Yes, I did. We landed over here on the la-

(Testimony of Denton Moore.)

goon and this fellow came down to meet the plane and introduced himself as the foreman or superintendent or whatever you call it.

Q. Do you know what his name was?

A. Denham. I believe that would be, and I discussed with him the possibility of getting work and I also discussed with him generally the possibility of a large number of local people getting work here.

Q. Tell us to your best recollection of your conversation, what did you say to Mr. Denham and what did he say to you?

A. Well, that was, of course, sometime ago, but he invited us up for coffee and Hudsen didn't want to take the time, so we talked there and he said that this was going to be a peak year here, that is, 1956.

Q. Denham said that?

A. Yes. And he said that they anticipated having about 200 employees. I asked him then about the local people getting work here, and he said that he had orders, and these are almost his exact words, he had orders to be good to the natives because they were going to try to get as many of them as they could, and I said, "That means I will be able to get a job myself", and he said yes. I asked him when he would like me to come to work and he said about the first of May or when the airfield dries up. At that time they couldn't land any big airplanes because the field was wet. And that was about all the conversation that we had. That's what it boils down to.

Q. Now, did you go back at a later time?

(Testimony of Denton Moore.)

A. Yes. I did not go back on the 1st of May because—of course we were paying close attention—it costs quite a lot of money to fly down here from my home, and we were watching the operation very closely, and I knew that the field wasn't dry and that there was nobody here but a skeleton crew until June, the [143] early part of June. So it was about the first week or so of June that Hudsen returned to my home and he had with him Chester Wilson from Iliamna and Chester told me that he understood that M-K was bringing in a lot of laborers and this was our chance to go to work.

Q. Who is Chester Wilson?

A. A young fellow that lives over at Iliamna.

Q. Homesteader also?

A. No, no, he is a native boy. The thing seemed to be so definite that I took my sleeping bag and all of my clothing, I was prepared to stay. And so we got down here and came up to the office.

Q. Of Morrison-Knudsen?

A. Yes, and Mr. Shumway.

Q. Who is Mr. Shumway?

A. He was the superintendent here.

Q. Did you have a talk with him?

A. He was in the office, and so I asked him about going to work and he seemed to be quite surprised. I mean he didn't apparently have our names or anything, and he said, well, he said that he didn't know and he thought that we would probably go to work all right, but he couldn't put us to work right away. And so he said he would have to clear this

(Testimony of Denton Moore.)

through Anchorage, Chester and my employment, and then he would let us know. So I asked him how he planned to get in touch with [144] me because our mail at Kakhanok is rather erratic and he said well, he didn't know, he thought he would send me a telegram, so I said all right, and I gave him my radio station call sign and my schedule time. And then I would make my own arrangement for getting over here. So that was about the sum and substance of it there.

Q. Was anything said at that time about the union?

A. Yes, he asked me if I belonged to the laborers' union and he asked Chester the same question, and he stated he didn't.

Q. What happened after that?

A. Then he returned home.

Q. Was that the last time you were over here?

A. Yes.

Q. Did you hear anything from Mr. Shumway or from any of the officials of Morrison-Knudsen?

A. No, not arising out of this. Of course I wrote to them later but I never did hear anything about any of this at all.

Q. You wrote to Morrison-Knudsen about a job?

A. Oh, yes.

Q. Do you have a copy of that letter with you?

A. I think I turned it over to the N.L.R.B.

Q. Was that in reference to employment?

A. Yes, we wrote a number of letters to Morrison-Knudsen various times about employment and

(Testimony of Denton Moore.)

chances of getting work. Some of the letters were unanswered and so we just got a form [145] letter back.

Q. Did you file a formal application with Morrison-Knudsen for employment?

A. No, no, I didn't. This Mr. Denham didn't suggest it and it never occurred to me. It didn't make much difference.

Q. Then did you later go to Anchorage?

A. No, chronologically, of course, we watched this thing very closely. By the 10th of May, as it happened that year, our alternative means of making a living is commercial fishing. The commercial fishing season opens on the first of June and closes the 25th of July. The regulation in 1956, which also is the regulation this year, was that in order to fish you had to give Fish and Wild Life prior notice which meant that in order to fish I would have had to notify Fish and Wild Life by the 25th of May, and so by the time I came over here on the 10th of June and found out that there was no job, why, it was probably too late to make arrangements to go fishing. So we were pretty near stuck. So I went to Iliamna several times and I talked to the union people there in Iliamna, Mr. Ingram I think his name was.

Q. Who was Mr. Ingram?

A. I am not sure that was his name, but he introduced himself as the job steward from Local 341 of the Laborers.

(Testimony of Denton Moore.)

Mr. Morrison: Will you get the time on that, please?

The Witness: When I talked to him? [146]

Mr. Morrison: I am requesting, Mr. Examiner, that before he discusses any particular interviews that we have the time determined.

Trial Examiner: Will you fix the time and place.

Q. (By Mr. Latimer): When was that?

A. I believe it was in June. I gave all that to Mr. Immel, and it is in the record.

Mr. Morrison: I move any reference of anything he gave to anyone that it be stricken.

Trial Examiner: He is just giving that to Mr. Latimer.

Was it after June 10th?

The Witness: Yes, sir.

Trial Examiner: How long after?

The Witness: Well, I should say it was in the latter part of June, to the best of my recollection. It happened that they were loading a scow, the airplane had landed at Iliamna and they were transshipping merchandise over here.

Trial Examiner: Who was?

The Witness: M-K moving the stuff. And this gang working on the scow was this man who told me that he was the labor steward. So I asked him what the situation was and about getting a job and so forth and just what sort of runaround we were getting, and he said, well, he said, "Frankly," he said, "M-K doesn't want to hire natives, and he said they have a lot of trouble with them, that when

(Testimony of Denton Moore.)

they have a pay day, they get [147] paid once a week or once every two weeks, and then they go and get drunk and don't show up for work and it disrupts the work, so he said they are not very keen about it, and I said, "How does a white man get a job here?" He said, "In order to get a job the best thing you can do is go to Anchorage, join the Laborers Union and request to be sent out to Site 2," which was the Big Mountain site. And, "Well," I said, "I can't afford to go to Anchorage, I am not fishing this year, I don't have any great amount of income", and I said, "Would a letter suffice?" and he said no, you should go in personally. He was trying to be helpful.

Q. (By Mr. Latimer): Just tell us the conversation.

A. That was the sum and substance of it.

Mr. Latimer: Will you mark this, please.

(Thereupon the document above referred to was marked General Counsel's Exhibit Nos. 11-A and 11-B for identification.)

Q. (By Mr. Latimer): I will hand you what has been marked for identification as General Counsel's Exhibit 11-A and ask you if you can identify that.

A. That's a letter I wrote to the personnel office of Morrison-Knudsen Company.

Q. In reference to employment?

A. Yes, sir.

Q. I show you what has been marked for iden-

(Testimony of Denton Moore.)

tification as General Counsel's Exhibit 11-B and ask you if you can identify [148] that.

A. Yes, sir, that's a copy of the letter that I received from them.

Mr. Latimer: I offer them both in evidence.

Mr. Morrison: I would like to ask some questions on voir dire, if I may.

Trial Examiner: Very well.

Q. (By Mr. Morrison): Mr. Moore, what has been designated General Counsel's Exhibit 11-A appears to be a typewritten copy of a letter from the personnel office of Morrison-Knudsen to you. Did you make a copy of the letter at the time it was written? A. Yes, sir.

Q. This is not a carbon copy, is it? A. No.

Q. Do you have a carbon copy of the letter you wrote?

A. I turned that over to the N.L.R.B. I might have made two carbons——

Q. (Interrupting) Just answer the question.

Mr. Morrison: If they can't produce the original copy I am going to object on the grounds of identity.

Second, it is not material to any issue in this case, and it is purely a self-serving statement of the witness. [149]

Trial Examiner: Are you introducing this letter for the purpose of proving the statements therein are true and correct?

Mr. Latimer: I am introducing it as a copy of

(Testimony of Denton Moore.)

the letter that Mr. Moore wrote to the company in reference to employment.

Trial Examiner: But not to prove that the statements contained therein are true and correct?

Mr. Latimer: I haven't examined the witness on that, not at this time, no.

Trial Examiner: Have you got the carbon copy of the letter?

Mr. Latimer: I don't think so.

May we go off the record a moment?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Latimer: May we take a short recess?

Trial Examiner: We will take a short recess at this time.

(Short recess.)

Trial Examiner: On the record.

Have you seen such a letter in the company records?

Mr. Morrison: Let me see the letter and I will show it to Mr. King.

We would have to make an examination of the general correspondence files in Anchorage to see if such a letter was [150] received. My point is that even if the identity of the letter is correct, which we are not willing to concede, I don't see where it is material in any relevant issue in this case.

Trial Examiner: I will overrule the objection and receive the papers in evidence. Do you have the same objection to 11-B?

(Testimony of Denton Moore.)

Mr. Morrison: If one goes in, if one goes in I don't object to the other going in.

Trial Examiner: I will overrule the objection and receive the papers in evidence, and I will ask the reporter to kindly mark them as General Counsel's Exhibits 11-A and B, respectively.

(The documents heretofore marked General Counsel's Exhibits Nos. 11-A and 11-B for identification were received in evidence.)

Q. (By Mr. Latimer): Did there come a time later, Mr. Moore, when you went to Anchorage? Was that the last time you went to Big Mountain when you talked to Mr. Shumway?

A. I have been in Anchorage several times. I didn't see anybody in Anchorage.

Q. Did you talk to anybody in the laborers' union there? A. No, sir.

Q. Do you know a Mr. Ted Hutz?

A. Yes.

Q. Who is he?

A. He was the job steward at King Salmon in 1955. [151]

Q. Did you have a conversation with him in 1956? A. No, sir.

Q. Did you talk to him in '55? A. Yes, sir.

Q. When was that conversation?

A. That was shortly after I returned from Anchorage. I was in Anchorage that time discussing matters of employment, and that was in August that I saw Mr. Hutz in Naknek.

(Testimony of Denton Moore.)

Q. Did you discuss employment with him at that time?

Mr. Hartlieb: I would like to object to this line of questioning. This is 1955. I don't see what materiality there is.

Mr. Latimer: I am checking it now. I will withdraw the question.

Q. (By Mr. Latimer): Well, did you discuss with any of the union officials in Anchorage the possibility of getting work at Big Mountain?

Mr. Morrison: Again may I ask was this——

Q. (By Mr. Latimer—interrupting): This was during the spring or summer of 1956?

A. No, sir.

Q. After your visit to Big Mountain did you take this matter up with anybody at any time thereafter?

Mr. Morrison: Which visit is this?

Mr. Latimer: '56. [152]

Q. (By Mr. Latimer): That was when you talked to Mr. Shumway in June, I believe you said?

A. I wrote letters to Mr. Bartlett, who is a delegate to Congress, in this matter.

Mr. Morrison: I object to this, it is not responsive.

Trial Examiner: We are not interested in that, Mr. Latimer.

Q. (By Mr. Latimer): Did you talk to anybody from the union or from M-K?

A. I talked to Mr. Dodge of Western Electric.

Q. What is Mr. Dodge's job?

(Testimony of Denton Moore.)

A. I am not sure what his position is. I understand he was sort of a superintendent for Western Electric here in Alaska, but I can't swear to it because I am not sure.

Q. Where did you talk to him?

A. At Iliamna.

Q. When? A. In August, I believe.

Q. '56?

A. Yes, sir. Either August or early September. I believe it was the latter part of August. I had written to——

Mr. Morrison (interrrupting): Just a moment, there is no question pending now.

Q. (By Mr. Latimer): You say this conversation took place in Iliamna? [153]

A. Yes, sir.

Q. August, '56? A. Yes, sir.

Q. Who was present?

A. Well, there was myself, Mr. Dodge, and Mr. Lawson, I believe his name was, also Western Electric, their pilot from Circle Airways.

Q. Tell us about the conversation.

Mr. Morrison: Objection.

Trial Examiner: What about that?

Mr. Latimer: Western Electric was the prime constractor as I understand it on the Big Mountain project, and Morrison-Knudsen was the sub-contractor.

Mr. Morrison: Morrison-Knudsen would be a sub-contractor in any event. What Western Electric did would not be binding on Morrison-Knudsen.

(Testimony of Denton Moore.)

Trial Examiner: I will sustain the objection.

Q. (By Mr. Latimer): Is that the last time you made an effort to obtain employment?

Mr. Morrison: He stated he talked to Mr. Dodge and to the form of the question I object.

Trial Examiner: Reframe your question. It is a little ambiguous.

Mr. Latimer: I will withdraw the question as it is.

Q. (By Mr. Latimer): What efforts, if any, did you make after [154] June of '56, when you talked to Mr. Shumway, did you make to obtain employment at Big Mountain?

A. I wrote these letters and so forth.

Q. You didn't talk to anybody else?

A. No, sir.

Q. Did you talk to anybody connected with the Morrison-Knudsen Company with reference to employment for people other than yourself, for local people?

A. Well, this Bill Smith came to see me but he was quite ambiguous in the conversation and was presuming——

Q. (Interrrupting) Who is Bill Smith?

A. He is the pilot for Circle Airways.

Q. Did you talk to anybody connected with Morrison-Knudsen?

A. He was under charter of Morrison-Knudsen.

Q. When did you talk to him?

A. This was in June. I can't recall whether it was either immediately before or immediately

(Testimony of Denton Moore.)

after I had been to Iliamna and seen this Mr. Ingram. Approximately the same time.

Q. Who was present at that conversation?

A. My wife and Bill Smith and myself.

Q. What was said?

Mr. Morrison: Objection to any conversation with the pilot of Circle Airways. There is no showing he represents Morrison-Knudsen in any other capacity other than a pilot.

Trial Examiner: What about that, Mr. Latimer?

Q. (By Mr. Latimer): This Bill Smith was a charter pilot? A. Yes, sir.

Q. Running his own airplane? A. Yes, sir.

Mr. Latimer: I will withdraw the question.

Your witness.

Trial Examiner: Any questions, Mr. Morrison?

Mr. Morrison: Yes, I do.

Cross Examination

Q. (By Mr. Morrison): Mr. Moore, you state you live in Kakhanok Bay? A. Yes.

Q. On Lake Iliamna? A. Yes.

Q. About how far is that in distance from Big Mountain?

A. Well, nobody's ever measured it accurately. It approximately, oh, I should say between 25 and 35 miles.

Trial Examiner: Is that air miles?

The Witness: Yes, sir.

Q. (By Mr. Morrison): Do you have a boat, Mr. Moore? A. Yes, sir.

(Testimony of Denton Moore.)

Q. How long would it take you to travel that distance by boat? A. About four hours.

Q. You stated that your principal occupation was as a [156] commercial fisherman?

A. Yes, sir.

Q. Is that as a gill net fisherman at Bristol Bay?

A. Yes, sir.

Q. Did you fish in 1956? A. No, sir.

Q. Did you make any application or attempt to fish in 1956? A. No, sir.

Q. Where in the past did you principally fish, out of Naknek?

A. Well, yes, I think that would be the—most of the time.

Q. In 1956 did you go to Naknek?

A. No, sir.

Q. The fishing season in Bristol Bay usually runs from, and in 1956 did run from, June 25th until July 25, is that correct? A. Yes.

Q. After July 25th, you then are available to pursue whatever occupation you wish without interfering with your fishing? A. That's right.

Q. And you cannot commercially fish after July 25th? A. That's right.

Q. In the Bristol Bay area at least?

A. Yes, sir.

Q. Mr. Moore, how long have you been a commercial fisherman?

A. Well, approximately ten years. I think I missed four [157] seasons out of the ten years, something like that.

(Testimony of Denton Moore.)

Q. For whom do you usually fish?

A. On an independent basis since 1954. One year I fished for the canneries.

Q. Is there any particular cannery to whom you sell your fish even though fishing as an independent?

A. This year and in the past I have sold my fish to Nakat Packing Corporation.

Q. You say this year, that's 1957?

A. Yes, sir.

Q. How much did you earn in 1956?

Trial Examiner: What is the purpose of this?

Mr. Morrison: To the reasonableness of his opportunities and conduct in examining the various statements we have heard.

Trial Examiner: Does it go to back pay?

Mr. Morrison: No, to the reasonableness, to the course of conduct he has described in 1956.

Trial Examiner: Very well, go ahead.

The Witness: How much did I earn?

Q. (By Mr. Morrison): Yes.

A. Approximately $4,300, gross of course.

Q. That was earned during the one-month period? A. That's right.

Q. What do you mean by gross?

A. You have got your normal operating expense, your gear, [158] board and room and taxes, of course.

Q. Eliminating taxes, what is your net?

A. It would be approximately thirty-five hundred, thirty-six hundred.

(Testimony of Denton Moore.)

Q. Mr. Moore, have you ever worked for Morrison-Knudsen? A. No, sir.

Q. Have you ever worked for any construction company of heavy construction type company?

A. Only once and that was in 1942, at Bremerton, Washington, I worked for a short time as a construction laborer.

Q. For how long a period do you mean by a short time?

A. Well, I don't remember. It was just a month or two, approximately three, something like that.

Q. And what type of work did you do?

A. Just general labor. They were building some housing projects. Pick and shovel and loading trucks and so forth.

Q. Would it be fair to say that you have no qualifications in the construction business for any work other than plain labor such as pick and shovel and loading and unloading work?

A. Well, sir, I don't know. I don't understand your question. In a sense, let me frame my answer this way. I have built a saw mill, I have done a lot of work over there, I think I could handle almost any general labor job. I operate my own machinery and all sorts of things, and so as far as——

Q. (Interrupting) What do you mean by general labor? [159]

A. Well, if I understand your question correctly, what you are suggesting is that about all I am qualified to do is handle a pick and shovel.

Q. No, I wondered in connection with heavy con-

(Testimony of Denton Moore.)

struction, such as dirt road construction and what-have-you, what qualifications do you have.

A. Yes, sir, that's true, common laborer. That's the sort of job I was looking for.

Q. Mr. Moore, how does information, how is it passed around Lake Iliamna from the various people who live here, the residents?

A. You mean how do we keep in contact with each other?

Q. How do you know what is going on?

A. Sometimes it is pretty hard to know. We have our radio net here.

Q. Do you have a radio? A. Yes, sir.

Q. And you contact Lake Iliamna by radio?

A. Yes, sir.

Q. I don't mean Lake Iliamna, I mean the village. A. Yes, sir.

Q. Did you contact any other radios in the vicinity?

A. Pile Bay, I contacted Pedro Bay when they were still operating radios up there.

Q. Can you contact King Salmon? [160]

A. Yes, sir, I can. I don't frequently, but I can.

Q. Have you ever tried contacting Site 2 on your radio?

A. I believe once or twice I did try but I wasn't able to get through. Of course they don't stay on schedule with us. It is pretty hard to make contact with them. But I believe on two occasions when I heard that they were bringing labor in from Anchorage I did try to call without success.

(Testimony of Denton Moore.)

Q. You called all these others but you were unable to contact Site 2?

A. These others are all on regular schedule, Site 2 wasn't. It is sort of a hit and miss proposition.

Q. Can you contact Anchorage with your radio?

A. I have only on one or two occasions. It is just an unusual situation.

Q. But when you have, you can, I take it?

A. If conditions are good.

Q. If you can't do it one day if the weather changes you can the next?

A. We have regular telephone and telegraph service, but that goes through the ACS Station in King Salmon. There again it is a chance of trying to call——

Q. (Interrupting): Now, as I recall your conversation you first contacted Morrison-Knudsen personnel in connection with working at Big Mountain in the spring of 1956?

A. Well, no, sir, that's not exactly correct. I did have [161] contact with Mr. Wolfe in the fall of '55, but I guess that's out of the date so——

Q. Was that in connection with attempting to lease your tractor to Morrison-Knudsen?

A. No, I talked to Mr. Wolfe at King Salmon relative to the opportunities of employment, that was when this job here was still in the planning stage and he told me that he frankly doubted if there would be any local people hired.

Q. You mean at King Salmon, from Lake Iliamna?

(Testimony of Denton Moore.)

A. No, for this Iliamna job, local people from Lake Iliamna.

Q. When in 1956 did you first contact someone from M-K in connection with Site 2 work?

A. That was Mr. Denham. Unless I wrote some letters. I may have written before then. I can't remember.

Q. You mentioned the spring of 1956, when in the spring?

A. You mean when I wrote the letters?

Q. No, when you talked to Mr. Denham.

A. That was in April.

Q. Now, in April there was virtually no activity here, is that correct?

A. I don't think there was anything going on at all.

Q. Did Mr. Denham at that time tell you to check back later?

A. He told me that as soon as the field opened up, approximately May 1st, that I could go to work. It was that definite.

Q. And how did he propose getting in touch with you? Or [162] did you propose a method of getting in touch with him?

A. I can't recall. He knew where I lived and I can't recall that it was discussed. But they had the site plane here and I imagine I just assumed that they would send the plane over when they needed me. So I wasn't too concerned when May 1st came and went——

(Testimony of Denton Moore.)

Q. I am not interested in that. I wondered just how they proposed——

A. (Interrupting): I just say I assumed——

Q. (Interrupting): There was no discussion with you and Mr. Denham in how you would get in touch with each other?

A. I am straining my memory pretty hard.

Q. If you don't recall——

A. I believe he said he would get in touch with me.

Q. But you don't recall the conversation?

A. No, sir.

Q. As I understood your testimony, the next time you applied for a job at Site 2 was the latter part of June, is that correct?

A. No, it was about the middle of June. Or the early part of June when I came over here with Hudson.

Q. Is that when you talked with Mr. Shumway?

A. Yes, sir.

Q. And that was, you say, the first week in June?

A. Somewhere in the first two weeks, I would say between the 7th and 14th. I am not sure. It was approximately that time. [163]

Q. And did I understand that Mr. Shumway advised you that he had no work for you at that time?

A. That's right.

Q. And what type of work were you asking for?

A. Regular laborer's work.

(Testimony of Denton Moore.)

Q. Was anyone else working on the project at that time?

A. Well, there was a gang here. There were quite a few people around, but what they were doing I don't know.

Q. Do you know whether any other natives or local residents were working at that time?

A. I can't be sure about that either. Local residents had worked before this and subsequent to this they worked, but whether they were actually working at that time I can't answer.

Q. It is a fact, isn't it, that there were quite a few local residents who did work during periods of June in loading and unloading for Morrison-Knudsen? Do you know that?

A. I know the whole story.

Q. You know that there were quite a few local residents who did work in June? A. Yes.

Q. Did you thereafter come back and apply for work to anyone in a position of authority for Morrison-Knudsen at Site 2?

A. No, sir, I never came back here again.

Q. What were you doing during this time yourself?

A. Running my sawmill, working in the garden. I didn't have [164] any major project in mind, just sort of fiddling around trying to earn a living where I could. There just wasn't anything actually, except for cutting logs and sawing lumber, and of course that's——

(Testimony of Denton Moore.)

Q. (Interrupting): You had plenty of time then during this period? A. Oh, absolutely.

Mr. Morrison: I have no further questions.

Cross Examination

Q. (By Mr. Hartlieb): Mr. Moore, how long have you lived in this immediate area?

A. Approximately six years.

Q. You know most of the people in the area, do you not, the natives? A. Yes, sir.

Q. And you were, I believe, United States Commissioner for a period of time? A. Yes, sir.

Q. And as such you dealt with the natives quite a bit? A. Yes, sir.

Q. Do the natives in the area drink quite a bit?

Mr. Latimer: I object to that.

Trial Examiner: Overruled.

A. That's a pretty general question. It is like asking if white people drink a great deal. Some do and some don't. [165]

Q. (By Mr. Hartlieb): Is your answer then some natives do and some don't? A. Yes, sir.

Q. Would you say that the natives are dependable workers on the whole——

Mr. Latimer (interrupting): I object to that. It calls for a conclusion.

Trial Examiner: I will sustain the objection.

Q. (By Mr. Hartlieb): Prior to this job here in 1956, the location we are at now, has there been any other construction in the immediate vicinity, construction project?

(Testimony of Denton Moore.)

A. Not where I have had personal knowledge. I understand they used a lot of local help when they built this field over here at Iliamna.

Q. How long ago was that?

A. Back in the 40's, long before I came into the country.

Q. Directing your attention to June of '56 when you had a conversation with Mr. Ingram in Naknek, was it? A. No, sir, over at Iliamna.

Q. You stated that he was the steward for the laborers union. How did you know that?

A. He introduced himself.

Q. He stated that he was? A. Yes, sir.

Mr. Hartlieb. I have no further questions. [166]

Redirect Examination

Q. (By Mr. Latimer): Mr. Moore, you said you did not seek an application to fish during the 1956 season. Was there any particular reason that you did not apply for a fishing license at that time?

A. Yes, sir, I was sure that I was going to go to work.

Q. For whom?

A. For Morrison-Knudsen. The reason there were several reasons for it. To answer the question fully I have to give you some background. We had had three successive salmon failures at Bristol Bay and I just frankly couldn't afford to go fishing any more, it was a last ditch thing.

Q. My question is, why didn't you apply, was

(Testimony of Denton Moore.)

it because you were going to work, or because the season before had been so lousy?

A. I would have had to fish naturally if I didn't go to work. But I assumed that work was forthcoming so I didn't apply.

Q. You said that some of the local residents worked on loading and unloading barges in '56?

A. Yes, sir.

Q. You said you knew all about that. Tell us about that.

A. It was just a casual labor operation. The airplanes would bring freight in bound for Big Mountain here but they would have to land over at Iliamna, so they loaded the freight off the airplanes and onto these scows. And the way that it [167] worked out they had these fellows standing by and use them on a casual basis, I don't know what numbers of hours were involved, but they also did the same thing at Pile Bay and Iliamna Bay and of course that was quite serious because they had those people up there waiting the whole season and some only got three days' work.

Mr. Morrison: Objection.

Trial Examiner: I will overrule the objection.

Q. (By Mr. Latimer): Go ahead, Mr. Moore, tell us what you know about it.

A. That's about all. They called these people up there, asked them to go to work and then gave them a day's work and then they had to wait another week or two weeks for another scow, at their own expense of course, and it just didn't work out.

(Testimony of Denton Moore.)

Q. Actually some of the local residents worked for several months on the Big Mountain project, didn't they?

A. Yes, sir, right here, yes.

Q. But from your observation for the most part, the natives were casual workers?

Mr. Hartlieb: Your Honor, I object. He has no way of knowing that.

Mr. Morrison: I will object to the term of casual worker.

Trial Examiner: Somebody brought it in.

Mr. Morrison: Mr. Latimer or Mr. Moore. [168]

Trial Examiner: All right, reframe your question.

Q. (By Mr. Latimer): I will ask you, Mr. Moore, from your observation what you know of the amount of work that the natives and local residents did. Is it a fact that they worked a day or two at a time only or a month or two at a time?

A. There were two distinct jobs. There were these freight operations which were on a casual basis where a man might go to work one day a week and then there was regular employment here at Big Mountain. There were two local men employed here for much of the construction period here. And the rest of the people received work in these casual situations or in the late fall of '56 and of course they hired a lot of local people here.

Q. In the late fall of '56? A. Yes.

Q. Can you give us a reason for that?

A. I can only surmise a reason.

(Testimony of Denton Moore.)

Mr. Latimer: That's all.

Trial Examiner: Any questions, Mr. Morrison?

Recross Examination

Q. (By Mr. Morrison): I would like to ask you a couple of questions concerning these natives. Where did they usually live?

A. What do you mean, sir, Pile Bay and [169] Iliamna?

Q. I believe you testified that the natives were called to Pile Bay and they had to live up there at their own expense? A. Yes, sir.

Q. I wonder where these natives, are you familiar with the natives that worked in Pile Bay?

A. Familiar with them, I know them, yes.

Q. Where do they usually live?

A. They lived in Pedro Bay, most of them.

Q. Pedro Bay is just a few miles from Pile Bay, isn't it? A. About ten miles.

Q. How long does it take to get from Pedro Bay to Pile Bay?

A. Well, I don't know. They have to go around an island there and I have never made that trip so I can't tell you.

Q. Did these natives have boats?

A. Yes, sir.

Q. Is that the customary way of traveling on Lake Iliamna? A. Either that or a dog team.

Q. Dog team in the winter when it is frozen over? A. Yes.

(Testimony of Denton Moore.)

Q. And they get around on boats during the summer? A. Yes, sir.

Q. What is the nature, what do they live in at Pedro Bay, do they have houses? A. Yes.

Q. And when they go to Pile Bay, what do they live in, tents? [170]

A. Either tents or possibly with friends. I don't know what arrangements they made individually.

Q. Is there also a village at Pile Bay?

A. Yes, sir.

Q. What is the source of their income when they are not working, for, say, a construction company or some other outside employer?

A. They are commercial salmon fishermen.

Q. Principally fishermen? A. Yes, sir.

Q. So when there is no fishing season and no other employment, they more or less live on previous earnings or what they can obtain from—well, do they have any other income?

Mr. Latimer: I don't see the materiality of these questions.

Trial Examiner: I will overrule the objection. Go ahead.

A. Some of them trap in the wintertime, make a few hundred dollars trapping. But other than that there really isn't much of anything. Oh, there are a few little industries like berry picking and so forth, but they don't amount to a great deal. In recent years there has been quite a lot of relief in here.

(Testimony of Denton Moore.)

Mr. Morrison: I have no further questions.

Trial Examiner: Mr. Hartlieb? [171]

Recross Examination

Q. (By Mr. Hartlieb): Mr. Moore, do you own a boat? A. Yes, sir.

Q. Is it a commercial fishing boat?

A. Yes, sir.

Q. Did you own one in 1956? A. Yes, sir.

Q. How old was that boat?

A. I had an old boat then. I don't think anybody actually knows, it was probably 25 years old, it was an old hull is what it was.

Q. How long had you owned it?

A. I got it in '53, '54, I guess it was.

Q. '54? A. Yes, sir.

Q. Was it safe to use during the 1956 season?

A. It would have required a lot of work to put it in satisfactory working condition.

Q. To go fishing? A. Yes, sir.

Q. Did you do any work on it during the '56 season? A. No, sir.

Q. Did you subsequently acquire a new boat?

A. Yes, sir.

Q. Isn't it true that part of the reason that you didn't go commercial fishing was because your boat was in a relatively [172] unsafe condition and would require a lot of work?

A. Mr. Hartlieb, I had a choice in 1956. It wasn't like previous years, you are familiar with

(Testimony of Denton Moore.)

them of course. I could have gone fishing for the canneries in a cannery boat in 1956 which is what I would have done.

Q. Mr. Moore, in response to questions about casual laborers, in connection with the native people in this area, did you state that they worked a day or two? A. Unloading these scows, yes, sir.

Q. Did any of them work fairly steady at it?

A. Not to my knowledge.

Mr. Hartlieb: I have no further questions.

Mr. Latimer: No further questions.

Trial Examiner: You are excused, Mr. Moore.

(Witness excused.)

Mr. Latimer: May we go off the record for a minute?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: Back on the record.

We will stand adjourned now until 1:30.

(Whereupon a recess was taken until 1:30 o'clock p.m.) [173]

After Recess

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 1:30 o'clock p.m.)

Trial Examiner: On the record.

Mr. Latimer: I will call Mr. Rickteroff.

MIKE RICKTEROFF

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, sir?

The Witness: Mike Rickteroff.

Trial Examiner: And where do you live?

The Witness: Pedro Bay.

Trial Examiner: Mr. Latimer, you may proceed with the examination of this witness, who has been duly sworn.

Mr. Latimer: Thank you, sir.

Q. (By Mr. Latimer): Mr. Rickteroff, did there come a time during the spring or summer of 1956 when you applied for employment to Morrison-Knudsen Company at Big Mountain? A. Yes.

Q. Who did you talk to?

A. Well, we came down here the first of June, there was seven of us, we came down by power boat.

Q. Who were they?

A. There was Gille Jacko, Gus Jensen, George Jacko, Frank [174] Rickteroff, David Rickteroff, Alec Kolyna, and myself.

Q. First of June you say?

A. We came down here the first of June from Pedro Bay, by power boat.

Q. You came down here in June, you seven came down, by power boat? A. Yes.

Q. Who did you see when you got down there?

(Testimony of Mike Rickteroff.)

A. Bruce Shumway, he was the superintendent of this camp.

Q. Did you have a talk with him?

A. We had a talk with him.

Q. Tell us, to your best recollection, what was said.

A. We came here and Bruce Shumway was up to Pile Bay the day we came here. But the bookkeeper was here.

Q. Who was that? A. Jeff.

Q. Jeff who?

A. I don't know his last name. He asked what we wanted. We said we was looking for a job at M-K. "Well," he says, "Bruce Shumway is not here, he went up to Pile Bay. Well, anyway," he says, "you boys can come around again later on. So we went home the same *say*, you know. We went back to Iliamna and we stayed overnight there, from here. The next morning we got back home. We waited and waited, until about the 22nd of June, when we got a message from Pile Bay to come up there and sign up [175] for M-K job.

Q. Who was the message from?

A. Carl Williams.

Q. Who is Carl Williams?

A. He is a freighter at Pile Bay. He freights across from Pile Bay to Iliamna Bay, you see. And they sent a message down, there was a superintendent, his name was Curley, he lived there.

Q. What is his last name?

(Testimony of Mike Rickteroff.)

A. They called him Curley. He told them to hire us, Don Stump, he told him to hire us.

Trial Examiner: Will the reporter please read the last statement?

(Statement read.)

Q. (By Mr. Latimer): What or who is Don Stump? A. He was a missionary.

Q. What was Don Stump doing at that time?

A. He was a foreman, I think, a timekeeper for M-K.

Q. What happened?

A. We come up on June 22nd and they got us to sign our names down and told us we would go to work as longshoremen when the barge come in from Seldovia. Well, they took us over to Iliamna Bay the next day and put us to work.

Q. What were you doing?

A. We was unloading scows, drums and barrels.

Q. Off the scow? A. Yes.

Q. Off the barges?

A. Off from the barges. Well, we worked there about 12 hours one day, and the next day they put us on another half day, and that was all. They laid us off, and we waited and waited for the next barge to come in. That was maybe about a season, I think.

Q. About when was this?

A. In June, you know, until about the middle part of July they put us to work again as longshoremen. We worked there a couple hours and then they laid us off again. They were doing that all through the summer until most into August. Well,

(Testimony of Mike Rickteroff.)

just before the 14th of August we came down here again with a power boat.

Q. Down to Big Mountain? A. Yes.

Q. Who did you see at that time?

A. We saw Bruce Shumway who was here then. We came right in the office and we asked him——

Trial Examiner: Who is "we"?

Q. (By Mr. Latimer): Who was with you?

A. The same bunch was with me. Gille and I, and Gus.

Q. Same bunch?

A. Same bunch, yes. And we come in the office and we told [177] him we want to work.

Q. You asked Mr. Shumway?

A. Yes. Well, he got up and he told the bookkeeper definitely, he said, "Get these boys' names down on the paper," he says, "and when we need labor workers will call these boys up." So they got our names on the paper and we went home the same day and they told us that we could just stay home and wait until they called for us. Then we went home and stayed home until the 14th, when they called us.

Q. Until when? A. The 14th of August.

Q. Then what happened?

A. We came down here and went to work.

Trial Examiner: When did he have that conversation with Shumway?

Q. (By Mr. Latimer): How long before that did you talk with Mr. Shumway?

(Testimony of Mike Rickteroff.)

A. That was sometime in, oh, you might say around the 1st or 2nd of August when we came down here by power boat.

Q. The 1st or 2nd of August you talked to Mr. Shumway? A. Yes, we did.

Q. When did he send for you after that?

A. Around the 14th.

Q. Of August? A. Of August. [178]

Q. All right, then what happened?

A. They sent a plane after us. We was over at Iliamna Bay waiting there, standing by, and they picked us up from Iliamna Bay.

Q. Picked up all seven of you?

A. There was Gille and I and George and Frank. There was four of us. They picked us up there and brought us down there to put us to work.

Q. Did you go to work then? A. Yes.

Q. Mr. Shumway was superintendent at that time? A. He was.

Q. Now, how long did you work on that occasion? A. Well, I worked about seven weeks.

Q. After you started to work down there did you have a conversation with the union job steward?

A. Well, when we came down here we went to work about two days——

Mr. Morrison (interrupting): When?

Trial Examiner: When he first asked him if he had a conversation, if he had a conversation.

Will you tell us whether you had a conversation with the job steward?

The Witness: No; he asked us the labor——

(Testimony of Mike Rickteroff.)

Trial Examiner: Now, wait a minute. Will you kindly go ahead with the examination, Mr. Latimer.

Q. (By Mr. Latimer): Who was the labor steward on the job at that time, if you know?

A. A guy named Roy Ingram.

Q. After you started to work down here did you have a conversation with him? A. No.

Q. Did he come to you?

A. He come to me himself, yes.

Q. Did he have anything to say to you?

A. Well, he ask me——

Trial Examiner: (interrupting): When.

Q. (By Mr. Latimer): When was this? About?

A. That must be around——

Trial Examiner (interrupting): How long after you started to work?

The Witness: About two days afterwards.

Q. (By Mr. Latimer): He came to you?

A. Yes.

Q. What did he say to you?

Mr. Morrison: At which time, is this the first time he went to work or when?

Q. (By Mr. Latimer): Was this in August when you went to work on Big Mountain? A. Yes.

Q. Who was present when he talked to you? [180]

A. There was me and Gille Jacko.

Q. All right, now give us your best recollection of what he said to you.

A. He came and asked us if we would join the labor union. Well, before that——

(Testimony of Mike Rickteroff.)

Trial Examiner (interrupting): Just give us this conversation.

The Witness: He tell us to join the union and we said O.K., we will join the union. So we signed up.

Q. (By Mr. Latimer): What else did he say to you?

A. He didn't have nothing to say any more.

Q. Give me your best recollection of the whole conversation. What did he say to you, what you said to him.

A. Well, he didn't ask no questions.

Q. Tell us what he said.

A. He says, "You boys want to join the labor union?" and I says, "O.K., we will join the union," we says, so we did. That's all the questions he asked us.

Q. What did it cost you? A. $56.

Q. What was that for?

A. For joining the labor union.

Q. That was your initiation fee and dues for how long? A. I didn't pay no fees at all.

Q. How much did you pay? [181]

A. Well, the first payment was $56, that was all I paid.

Q. Did he say that you couldn't work here if you didn't join the union?

Mr. Hartlieb: I object to that, your Honor.

Trial Examiner: I will sustain the objection.

Q. (By Mr. Latimer): Do you remember anything else he said to you?

(Testimony of Mike Rickteroff.)

A. No, he didn't say anything any more.

Q. Just asked if you wanted to join the union?

A. Yes.

Q. Did Gille join also?

A. Yes, Gille joined also, yes.

Q. Anybody else there with you at that time?

A. There was Frank Rickteroff and George Jacko.

Q. Did Frank join too?

A. I think he did, I don't know for sure.

Q. How long did you work here?

A. Seven weeks.

Q. When was the last day you worked?

A. I was up the mountain working on September when I got, then I got infected from my hand.

Q. Then what happened?

A. And there was a doctor here, they had a First Aid doctor who was taking care of my hand for about a week and finally my hand got worse and this doctor says, "You might as well go [182] home," he says. I said, "What am I gonna do if I go home? What if I get worse when I go home?" He said, "What do you want to do?" I said, "I want you to send me to the hospital in Anchorage," Well, the doctor knowed that I had a skin disease. That's what he thought I had, you see. But I got the cement rash; I know myself. So the doctor went and told Jack Rankin. He took Bruce Shumway's place then; Rankin was superintendent afterwards. Jack Rankin believed what the doctor told him.

(Testimony of Mike Rickteroff.)

They thought I had a skin disease. Well, I kept hollering and finally I came back to this Roy Ingram, the labor steward. I told Roy, I said, "I want to get help," I says. "I want the company to send me to the hospital because my hand is infected from cement." Roy says, "I will go see Jack Rankin," which he did. Then they decided to send me to the hospital. The next morning Jack says, "Mike," he says, "we are going to send you to the hospital because your hand is pretty sore," and I said yes. "Well, Mike," he says, "while you are in the hospital you will get paid for all the while you are in the hospital. You will get paid from the company." I says, "O.K., that's very nice." I was in the hospital for three weeks. After three weeks I came back. That was October 22 when I came back here. Well, I got healed up all right, but the skin was kind of thin. Well, I went back to work on the 24th of October. When I went back to work my hand started to breaking out again; after that they had to send me home. That was the last part of October when they [183] sent me home.

Q. Anybody ever tell you that you had to be a member of the union to work up here?

Mr. Hartlieb: I object to that, your Honor.

Trial Examiner: Overruled.

A. No.

Mr. Latimer: That's all.

Trial Examiner: Any questions, Mr. Morrison? Do you want to go over your notes?

All right, we will take a short recess. Let me know when you want to go ahead.

(Short recess.)

Trial Examiner: On the record.

Any questions, Mr. Morrison?

Mr. Morrison: No questions.

Mr. Hartlieb: No questions.

Trial Examiner: Will you call your next witness, please?

Mr. Latimer: Mr. Examiner, this is the last witness I have at this time. I expected to have other witnesses here. However, because of the weather they haven't been able to get here. Planes are unable to land and the weather is so rough on the lake that boats are unable to land. So I will not have any other witnesses until the weather abates a bit.

Trial Examiner: Supposing we adjourn until tomorrow morning and see what the conditions will be.

Mr. Morrison: Adjourn subject to call, I take it?

Trial Examiner: I will set a definite hour and then we can discuss this right before that hour. Supposing 9 o'clock tomorrow morning, is that O.K.? Is that agreeable to you?

Mr. Morrison: Fine.

Mr. Hartlieb: That's fine.

Mr. Latimer: O.K.

Trial Examiner: We will stand adjourned until 9 o'clock tomorrow morning.

(Whereupon, at 2 o'clock p.m., Wednesday, September 11, 1957, the hearing was adjourned until tomorrow, Thursday, September 12, 1957, at 9 o'clock a.m.) [185]

Thursday, September 12, 1957

Proceedings

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Latimer: Yes, sir.

Mr. Hartlieb: Yes, sir.

Trial Examiner: What is the situation?

Mr. Latimer: Mr. Examiner, we communicated with the air line that was supposed to bring witnesses over here today and the weather at Pile Bay is apparently pretty rough. The pilot said he was not taking off today and he was going to remain there until the weather cleared up and probably wouldn't take off until tomorrow.

I therefore have no witnesses today.

Trial Examiner: What do you suggest we do?

Mr. Latimer: I suggest if we can get air transportation out of here that we go to Iliamna, take the testimony of the available witnesses there and if we can get into Pile Bay, go to Pile Bay and take the testimony of the witnesses there and go on back to Anchorage. I suggest that in the interest of expediting this matter.

Mr. Morrison: I think we had better go off the record for a minute.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

At the request of counsel we will stand adjourned now [189] until 1:30.

(Whereupon a recess was taken until 1:30 o'clock p.m.) [190]

After Recess

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 3 o'clock p.m., in Iliamna, Alaska.)

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Latimer: Yes, sir.

Trial Examiner: Do you wish to make a statement for the record, Mr. Latimer?

Mr. Latimer: As I explained earlier over at Big Mountain before we adjourned over there, that there were a number of witnesses available in Iliamna and it was suggested that we come over here to take the testimony of the witnesses here. We are here and the witnesses are here.

Mr. Morrison: By here you mean at Iliamna?

Mr. Latimer: Iliamna.

Trial Examiner: Will you call your first witness, please, or the next witness, rather.

Mr. Latimer: Take the stand, will you?

Trial Examiner: Will you step forward, sir, and be sworn?

ELIA ENOLON

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name?

The Witness: Elia Enolon.

Mr. Latimer: Elia Enolon. [191]

(Testimony of Elia Enolon.)

Trial Examiner: And where do you live?

The Witness: Iliamna.

Trial Examiner: You may be seated.

Mr. Latimer, you may proceed with the examination of the witness, who has been duly sworn.

Mr. Latimer: Thank you, sir.

Q. (By Mr. Latimer): During the spring of 1956 did you go to Big Mountain looking for work with Morrison-Knudsen Company up there?

A. Yes.

Q. About when was that?

A. In the springtime.

Q. Spring of 1956? A. Yes.

Q. Do you know who you talked to?

A. The superintendent at Big Mountain.

Q. Do you know what his name was?

A. I forget him.

Q. Do you know if it was Mr. Shumway or not?

A. No.

Q. You mean you don't know whether it was him or not? A. No.

Q. You don't know? A. No.

Q. But you think it was the superintendent?

A. Yes.

Q. Did you fill out an application for work?

A. I did.

Q. Did they put you to work? A. No.

Q. What did he tell you?

A. They said they are going to call us if they need us, that's all.

Q. Did you go back up there at a later time?

(Testimony of Elia Enolon.)

A. Later in the falltime.

Q. When was that? A. Falltime.

Q. In the falltime? A. Yes.

Q. Who did you talk to on that occasion?

A. They hired me.

Q. Do you know what month that was?

A. No.

Q. Didn't you work up there in June?

A. You mean here? I work here in the June month.

Trial Examiner: He means over at Big Mountain, did you work at Big Mountain in June?

The Witness: No.

Trial Examiner: When did you start to work at Big Mountain?

The Witness: October month. [193]

Q. (By Mr. Latimer): You were working for the company here in June, at Iliamna?

A. Yes, I did.

Q. What did you do here?

A. Unload cargoes.

Q. How long did you work in June?

A. I don't know.

Q. How long did it take to get the cargo unloaded? A. Sometime 50 minutes.

Q. About an hour? A. About that.

Q. On how many occasions did you work, how many times did you work unloading cargo?

A. I think, I can't think about it. I don't know how many times I worked.

(Testimony of Elia Enolon.)

Q. Did they ever send for you to work at Big Mountain?

A. They never send for me. Only one day come and ask us for a job, if we want to work, so we go with him.

Q. Where did you go?

A. Big Mountain.

Q. Did you work at Big Mountain?

A. Yes.

Q. When was that?

A. Falltime, September, I think.

Q. September? [194] A. Yes.

Q. How long did you work?

A. A month and a half.

Q. Did you join the union while you were up there? A. I did.

Q. Who did you talk to about that?

A. The union agent at Big Mountain.

Q. What did he say to you?

A. What did he say to me?

Q. Yes.

A. He never said not much about it.

Trial Examiner: Did he say anything?

The Witness: Not much.

Trial Examiner: Then he said something, he said something, didn't he?

The Witness: He never said not much.

Q. (By Mr. Latimer): Did he tell you what it was going to cost you?

A. He tell me how much it is going to cost me.

Q. How much did it cost you? A. $56.

(Testimony of Elia Enolon.)

Q. You don't remember what he said to you?

A. No.

Mr. Latimer: That's all. [195]

Cross Examination

Q. (By Mr. Morrison): Mr. Enolon, do you remember when you joined the union?

A. I don't know.

Trial Examiner: First you started to work, is that right, and then you joined the union?

The Witness: Yes.

Trial Examiner: How long after you started to work did you join the union?

The Witness: About two weeks after.

Mr. Morrison: No further questions.

Mr. Hartlieb: I have no questions.

Trial Examiner: Any redirect?

Mr. Latimer: No.

Trial Examiner: You are excused. Thank you very much.

(Witness excused.)

FRED OLYMPIC

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name?

The Witness: Fred Olympic.

(Testimony of Fred Olympic.)

Trial Examiner: How do you spell your last name, for the record?

The Witness: O-l-y-m-p-i-c.

Trial Examiner: And where do you live? [196]

The Witness: Iliamna.

Trial Examiner: You may be seated, sir.

Mr. Latimer, you may proceed with the examination of Fred Olympic.

Q. (By Mr. Latimer): Did you go to Big Mountain in the spring of 1956 looking for work?

A. Yes, we fill out applications there.

Q. Who did you go with?

A. I went up there and seen the superintendent, Chuck Wilson was the bookkeeper there, and we filled out an application.

Q. When was that? A. March month.

Q. Around March month? A. Yes.

Q. Who was with you? Who went up there with you? A. There was Elia, Sava.

Q. That's Elia Enolon and Sava Enolon?

A. Yes.

Q. Who else? A. Asseny Melognok.

Q. What did Chuck Wilson tell you?

A. He told us we get first chance when they need men to hire.

Q. And that was in March you say?

A. Yes.

Q. Did you go up after that? [197]

A. Yes, I went up there in the June month, first part of June, and he kept saying couple weeks,

(Testimony of Fred Olympic.)

that kept on and on and on until they had some emergency shipments they land through here.

Q. Did you go to work down here?

A. Off and on when they got planes in.

Q. When the planes would land here?

A. Yes.

Q. Did you help load the planes? A. Yes.

Q. How many times did you help unload the planes?

A. Art Lee has the record of the hours we worked.

Q. Did you ever work at Big Mountain?

A. Yes, I did during the fall, when they came after us we went over there.

Q. When was that?

A. I don't know exact the time we went over.

Q. Last fall do you think it was? A. Yes.

Q. How long did you work there, do you know?

A. Not very long. I didn't work over there very long.

Trial Examiner: Did you work a week?

The Witness: A little over a week.

Q. (By Mr. Latimer): Did anybody talk to you about the union up there? [198] A. No.

Q. You didn't join the union? A. No.

Mr. Latimer: That's all.

Trial Examiner: Any questions, Mr. Morrison?

Mr. Morrison: I have no questions.

Trial Examiner: Mr. Hartlieb?

Mr. Hartlieb: No questions.

Trial Examiner: You are excused. Thank you very much.

(Witness excused.)

Trial Examiner: Will you call your next witness, please, Mr. Latimer?

TREVIN ENDRU

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, please?

The Witness: Trevin Endru.

Trial Examiner: Where do you live?

The Witness: Iliamna.

Trial Examiner: You may proceed with the examination of this witness, who has been duly sworn.

Q. (By Mr. Latimer): Before you proceed——

Mr. Morrison (interrupting): This man does not appear to be listed on the complaint, Mr. Examiner. And I am going [199] to object to anyone who is not a specified discriminatee.

Trial Examiner: Objection is overruled.

Q. (By Mr. Latimer): Did you go to Big Mountain in the spring of 1956 looking for work?

A. Yes.

Q. Who did you go with?

A. I went all by myself with a dog team.

Q. Who did you talk to up there?

A. I couldn't remember.

(Testimony of Trevin Endru.)

Q. Do you know what his job was?

A. (No answer.)

Q. Do you know whether or not he was foreman or superintendent?

A. Foreman I think.

Q. What did he look like?

A. I couldn't tell you.

Q. Did you talk to him? Did you fill out an application blank?

A. I fill out application.

Q. Did he give you an application to fill out, help you fill it out? A. Yes.

Q. For work up there? A. Yes.

Q. What did he tell you?

A. He told me whenever he need us he is supposed to call us up. [200]

Q. Did he ever call you? A. Last fall.

Q. Last fall. When was this you talked to him? The first time you went up there, when was that?

A. In April month I think.

Q. That's when you first talked to him?

A. Yes.

Q. Did you go back and talk to him later?

A. No.

Q. When did he send for you?

A. I forget, I get hired across Kaknek by Owen Smith——

Q. (Interrupting) Bill Smith did you say?

A. Owen Smith.

Q. Who is he, did he hire you? A. Yes.

Q. Then where did you go?

(Testimony of Trevin Endru.)

A. Big Mountain.

Q. Who did you work for up there, do you know, do you know who your foreman was?

A. Owen Smith.

Q. Owen Smith, was that his name?

A. Yes.

Q. Did anybody talk to you about the union up there? A. No.

Q. Did you join the union? [201] A. Yes.

Q. Who did you talk to about it?

A. I forget that guy.

Q. Was his name Ingram, do you remember?

A. No, I couldn't think of his name.

Q. Would it be Alukas? A. Roy.

Q. Roy Ingram?

A. I think he was the union man.

Q. What did he tell you?

A. He never told me nothing, I joined myself.

Q. How much did it cost you?

A. $56, I think.

Q. How long did you work up there?

A. A couple of weeks.

Q. Then what happened?

A. I got laid off.

Mr. Latimer: That's all.

Trial Examiner: Any questions, Mr. Morrison?

Cross Examination

Q. (By Mr. Morrison): Do you remember when you joined the union?

Trial Examiner: How long after you started to work did you join the union?

(Testimony of Trevin Endru.)

The Witness: A couple weeks, I think; about a week. [202]

Trial Examiner: About what?

The Witness: About a week.

Mr. Morrison: No further questions.

Mr. Hartlieb: No questions.

Trial Examiner: You are excused, sir, thank you.

(Witness excused.)

Mr. Latimer: The next witness, please.

Trial Examiner: Will you kindly step forward and be sworn?

IRA WASSALLIE

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name?

The Witness: Ira Wassallie.

Trial Examiner: How do you spell your last name?

The Witness: W-a-s-s-a-l-l-i-e.

Trial Examiner: You may proceed with the examination of this witness, Mr. Latimer.

Q. (By Mr. Latimer): Did you go to Big Mountain looking for work? A. I didn't go.

Q. You didn't go? A. No.

Trial Examiner: Did you work at Big Mountain?

(Testimony of Ira Wassallie.)

The Witness: I worked when they hire me last fall. [203]

Q. (By Mr. Latimer): Last fall?

A. Yes.

Q. Where did you work?

A. Big Mountain.

Q. Who hired you up there?

A. They hire me from here and I went over there and worked.

Q. How long did you work over there?

A. About a month and a half.

Q. Anybody talk to you about the union up there? A. No.

Q. You didn't join the union?

A. I joined the union.

Q. Who did you talk to about it? Roy Ingram?

A. Yes.

Q. What did he tell you?

A. I worked one week, he tell me to join the union so I joined the union.

Q. What did it cost you? A. $56.

Q. How long did you work up there?

Trial Examiner: A month and a half he said.

Mr. Latimer: That's all.

Trial Examiner: Any questions, Mr. Morrison?

Cross Examination

Q. (By Mr. Morrison): Do you recall what he actually said? Did [204] he ask you if you wanted to join or did he tell you to join?

A. He never tell me to join, I join myself.

(Testimony of Ira Wassallie.)

Q. You joined yourself? A. Yes.

Q. He didn't tell you to join? A. No.

Mr. Morrison: No questions.

Trial Examiner: Any questions?

Mr. Hartlieb: No questions.

Trial Examiner: You are excused, sir. Thank you very much.

(Witness excused.)

Trial Examiner: Call your next witness, Mr. Latimer.

MAXIM WASSALLIE

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, please?

The Witness: Maxim Wassallie.

Trial Examiner: Where do you live?

The Witness: Iliamna.

Trial Examiner: You may be seated, sir. And Mr. Latimer, the witness has been duly sworn and therefore you may proceed with your examination.

Mr. Latimer: Thank you, sir. [205]

Q. (By Mr. Latimer): Did you go to Big Mountain looking for work last spring?

A. No, March month.

Q. March month? A. Yes.

Q. You went up there in March month?

(Testimony of Maxim Wassallie.)

A. Yes.

Q. Who did you go with? A. With Gust.

Q. Gus Jensen? A. Gabriel Gust.

Q. Who did you talk to up there?

A. I talked to Chuck.

Q. Chuck Wilson? A. Yes.

Q. Bookkeeper? A. (Witness nods head.)

Q. What did he tell you?

A. He told me he was going to hire us later on.

Q. Did you fill out a paper? A. Yes.

Q. Did he help you fill it out? A. Yes.

Q. And told you he would hire you later on?

A. Yes. [206]

Q. Did he hire you later on? A. No.

Q. Did he say he would send for you?

A. He told us he was going to send for us.

Trial Examiner: Did you ever work at Big Mountain?

The Witness: No.

Trial Examiner: You never did?

The Witness: No.

Trial Examiner: Did you work over here for M-K?

The Witness: Yes.

Q. (By Mr. Latimer): What did you do over here? A. Unload the airplane.

Q. How long did you work?

A. About a week.

Q. That was in June month? A. Yes.

Q. And you worked until July, is that right? How many airplanes did you unload?

(Testimony of Maxim Wassallie.)

A. I don't know.

Trial Examiner: One? Or two or three?

The Witness: Every day airplane land twice.

Trial Examiner: Did you do any work unloading planes in July month?

The Witness: No.

Trial Examiner: Just in June? [207]

The Witness: Yes.

Q. (By Mr. Latimer): Did anybody say anything to you about joining the union? A. No.

Mr. Latimer: That's all.

Trial Examiner: Mr. Morrison, any questions?

Mr. Morrison: No questions.

Mr. Hartlieb: No questions.

Trial Examiner: You are excused. Thank you very much.

(Witness excused.)

Trial Examiner: Mr. Latimer, will you kindly call your next witness.

SAVA ANELON

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name?

The Witness: Sava Anelon.

Trial Examiner: Where do you live?

The Witness: Iliamna.

(Testimony of Sava Anelon.)

Trial Examiner: Mr. Latimer, you may proceed with the examination of this witness.

Q. (By Mr. Latimer): Did you go to Big Mountain looking for work? A. Yes. [208]

Q. When did you go up there?

A. March month.

Q. 1956? A. Yes.

Q. Who did you talk to? A. Chuck Wilson.

Q. Who did you go with?

A. With dog team.

Q. Who went up there with you? A. Fred.

Q. Fred Olympic? A. Yes.

Q. Did you fill out an application? A. Yes.

Q. Did Chuck Wilson help you fill it out?

A. Yes.

Q. What did he tell you?

A. He tell me he going to hire me June 1st, somewhere around June 1st, then I sign up papers and everything.

Q. Did he say he would send for you?

A. Yes.

Q. Did he ever send for you? A. No.

Q. Did you work down here? A. Yes.

Q. What did you do down here? [209]

A. Plane, unload plane.

Q. How many times did you do that?

A. Let's see, about maybe three times a day.

Q. How many days? A. About a week.

Q. Anybody say anything to you about joining the union? A. No.

Q. You didn't join the union? A. No.

Mr. Latimer: That's all.

Trial Examiner: Mr. Morrison, any questions?

Mr. Morrison: No questions.

Mr. Hartlieb: No questions.

Trial Examiner: You are excused. Thank you very much.

(Witness excused.)

Trial Examiner: Mr. Latimer, will you call your next witness.

EVAN TRETIKOFF

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, please?

The Witness: Evan Tretikoff.

Trial Examiner: Where do you live, sir? [210]

The Witness: Newenham.

Trial Examiner: Mr. Latimer, you may proceed with the examination of this witness, who has been duly sworn.

Q. (By Mr. Latimer): Did you go to Big Mountain looking for work?

A. I never did go there, I signed papers, that's all.

Q. Where, here? A. Yes.

Q. To work at Big Mountain?

A. Got form that's all I signed, that's all.

Trial Examiner: He signed a form.

(Testimony of Evan Tretikoff.)

Q. (By Mr. Latimer): You signed a form here?

A. Yes.

Q. To work here?

A. To work at Big Mountain.

Q. When was that?

A. I forgot the date. I don't know what month I sign that paper.

Q. Last spring or summer sometime?

A. Last spring.

Q. 1956? A. Yes.

Q. Who did you talk to when you signed the paper? A. I get from Jack Drew.

Q. Was he working over there?

A. I guess he was working over there.

Q. You say he was working over there? [211]

A. I guess he was working over there.

Q. Did you work at Big Mountain?

A. No, I never work at Big Mountain yet.

Mr. Latimer: That's all.

Trial Examiner: Did you join the union?

The Witness: No.

Trial Examiner: Any questions, Mr. Morrison?

Mr. Morrison: I have no questions.

Trial Examiner: Mr. Hartlieb?

Mr. Hartlieb: No.

Trial Examiner: You are excused.

(Witness excused.)

Trial Examiner: Will you call your next witness, please?

Mr. Latimer: I have no further witnesses.

Trial Examiner: What is your pleasure now, or should we go off the record?

Mr. Latimer: Let's go off the record, yes.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Latimer, will you kindly call your next witness.

JACK DREW

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows: [212]

Direct Examination

Trial Examiner: What is your name, please?

The Witness: Jack Drew.

Trial Examiner: Where do you live?

The Witness: Iliamna, here.

Trial Examiner: Mr. Latimer.

Q. (By Mr. Latimer): Did you go to Big Mountain in the spring of 1956 looking for work?

A. Yes, I worked over there.

Q. Who did you talk to over there?

A. The first one that hired me was, what is his name, he was the superintendent.

Q. Was it Mr. Shumway? A. Don Wolfe.

Q. When did you start working up there?

A. It was early in the fall anyhow. It was the first year that they started up.

Q. That was '55, wasn't it? A. Yes.

Q. Did you work in '56? A. Yes.

(Testimony of Jack Drew.)

Q. Did you talk to anybody about the union over there?

Mr. Hartlieb: I object, your Honor. We have had a lot of leading questions, but I think this witness——

Trial Examiner (Interrupting): He is just calling his attention to the topic. I will overrule the objection. [213]

Q. (By Mr. Latimer): Did you talk to anybody about the union over there?

A. It was mentioned quite a bit.

Q. Who did you talk to?

A. Quite a few from the outside.

Q. Did you talk to the job steward over there?

A. Yes.

Q. Do you know what his name was?

A. They had so many of them. One was Roy.

Q. Roy Ingram? A. Yes.

Q. About when was that?

A. That was in '56 in the winter he was job steward.

Q. Is that when you joined the union?

A. I joined it about a month after I went to work.

Q. Did anybody ever tell you you had to join the union?

A. They mentioned it and they said if you wanted to keep on working you would have to join the union.

Q. Who told you that?

A. The job steward.

(Testimony of Jack Drew.)

Q. Was that Ingram? A. Somebody else.

Q. Alukas?

A. It probably was Alukas, yes.

Mr. Latimer: That's all. [214]

Trial Examiner: Any questions, Mr. Morrison?

Mr. Morrison: I have no questions.

Cross-Examination

Q. (By Mr. Hartlieb): When did you start to work over there, Mr. Drew?

A. I don't recall the month.

Q. Was it in 1955? A. Yes.

Q. Did you join the union in 1955?

A. That fall.

Mr. Hartlieb: This witness's testimony, I move that it be stricken. It isn't relevant here.

Trial Examiner: You mean because of the six-month limitation?

Mr. Hartlieb: Yes, sir. This charge was filed in October of 1956.

Trial Examiner: I know when it was filed.

Mr. Latimer: Let me ask him this before you rule on it, when did Alukas tell you this, if you remember?

The Witness: I don't recall.

Trial Examiner: Do you know what year?

The Witness: It was in '55.

Trial Examiner: How soon after you started to work did you have this talk with Alukas?

The Witness: It wasn't a talk. [215]

(Testimony of Jack Drew.)

Trial Examiner: How long after you started to work?

The Witness: About a month afterward.

Trial Examiner: All right, go ahead, Mr. Latimer.

Q. (By Mr. Latimer): And when did you start to work?

A. It was early in fall, I started to work. They took me down to Naknek first, I was on a boat first, I forget what month.

Q. When did you join the union?

A. It was in September I think.

Q. '55? A. Yes.

Mr. Latimer: Nothing else.

Trial Examiner: What about the motion to strike on account of the——

Mr. Morrison (Interrupting): The employer joins in that motion.

Mr. Latimer: I think it is well to leave it in the record for background. It is six months prior to the filing of the charge, that certainly can't be considered as evidence.

Trial Examiner: You mean six months prior to the filing of the charge you are not introducing this evidence as a basis for the finding of unfair labor practice, but merely for the purpose of background, is that right?

Mr. Latimer: For the purpose of background, and I think it will also show that that was probably the feeling of the people that worked up there.

Mr. Morrison: I object to it. [216]

Trial Examiner: Do you want it for background

(Testimony of Jack Drew.)

or for the basis of a finding of unfair labor practice?

Mr. Latimer: I don't see how you can use it for a finding of an unfair labor practice.

Trial Examiner: You are absolutely right there. You are just introducing for background purposes?

Mr. Latimer: Yes, sir.

Trial Examiner: The motion to strike is denied and the testimony is received only for the purpose of background and not for the purpose of, as a basis for any finding of unfair labor practice.

Q. (By Mr. Latimer): Let me ask you this——

Trial Examiner (Interrupting): Wait a minute, Mr. Hartlieb hasn't finished with his examination.

Mr. Hartlieb: I have no further questions.

Trial Examiner: You may proceed.

Cross-Examination

Q. (By Mr. Morrison): Did you ever discuss joining the union with any company personnel?

A. No.

Mr. Morrison: No further questions.

Redirect Examination

Q. (By Mr. Latimer): Did you discuss with other natives at work up there, did you ever discuss the union with them? [217]

A. There was three or four of them joined from around here.

Trial Examiner: Don't use the word "discuss", use "talk".

(Testimony of Jack Drew.)

The Witness: I didn't discuss.

Q. (By Mr. Latimer): Did you talk about the union?

A. I mentioned it one of a few time. I said it was the best thing to do because you could get a job all over.

Q. Was that the feeling of the natives up there, that they had to join the union?

A. That wasn't the feeling. They could work if they wanted to, I think. I don't think there was no club over their head.

Mr. Latimer: That's all.

Trial Examiner: Any questions, Mr. Morrison?

Mr. Morrison: No questions.

Trial Examiner: Mr. Hartlieb?

Recross-Examination

Q. (By Mr. Hartlieb): Mr. Drew, did you ever have a feeling that you had to join the union?

A. No, I didn't. It was for my advantage, I think.

Q. For your advantage, and is that the reason you joined? A. I think so, yes.

Mr. Hartlieb: I have no questions.

Trial Examiner: You are excused. Thank you very kindly.

(Witness excused.)

Mr. Latimer: That's my last witness, Mr. Examiner.

Trial Examiner: Off the record. [218]

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Latimer: I will call one more witness.

ROBERT DREW

a witness called by and on behalf of General Counsel, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner: What is your name, sir?

The Witness: Robert Drew.

Trial Examiner: Where do you live?

The Witness: Iliamna.

Trial Examiner: You may be seated, sir. And, Mr. Latimer, you may proceed with the examination of Mr. Drew, who has been duly sworn.

Q. (By Mr. Latimer): Did you ever work for Morrison-Knudsen at Big Mountain?

A. Yes, I have.

Q. When did you start working for them?

A. On October 10th.

Q. Of '55? A. '55.

Q. Where were you working at that time?

A. I worked here for two months.

Q. What were you doing here?

A. I was hauling freight from out the field into the beach and put on the scow. [219]

Q. Did you later work at Big Mountain?

A. Yes, I did.

Q. When did you go to work over there?

A. Somewheres around December 10th or so, I wouldn't say what day, but it was somewheres around there.

(Testimony of Robert Drew.)

Q. December of '55? A. '55.

Q. How long did you work at Big Mountain?

A. Until May 29th.

Q. '56? A. '56.

Q. Did you join the union while you were working at Big Mountain? A. Yes, I did.

Q. When did you join the union?

A. February.

Q. Of '56? A. '56.

Q. Did you have a conversation with anyone over there about joining the union?

A. No, I didn't. I did, they told me that I would have to join the union within 30 days or else I wouldn't have any more job.

Q. Who told you that? [220]

A. The labor steward.

Q. Do you know who that was?

A. I don't recall his name.

Q. Do you know if it was a man by the name of Alukas or not? Ingram?

A. No, not Ingram, Alukas.

Q. He was job steward at that time?

A. Yes.

Q. Was he made foreman while you were working over there?

A. Not that spring, but that fall he was.

Mr. Latimer: That's all.

Mr. Hartlieb: I would like to make an objection to the testimony——

Trial Examiner (Interrupting): You introduce this for background?

(Testimony of Robert Drew.)

Mr. Latimer: No, sir.

Q. (By Mr. Latimer): When did you talk to Alukas, when did he tell you that?

A. Sometime in early February, first few days of February.

Q. '56? A. '56.

Trial Examiner: Is this background?

Mr. Latimer: No, sir.

Trial Examiner: It can't be anything but. The charge was filed in October. [221]

Mr. Latimer: Background.

Trial Examiner: Your motion, Mr. Hartlieb, is denied. I will take this evidence for background purposes and not as a basis of any finding of an unfair labor practice.

Cross-Examination

Q. (By Mr. Morrison): Did you ever talk to any company personnel about the necessity, about having to join the union or whether you should or not? A. No, I haven't.

Mr. Morrison: I have no further questions.

Trial Examiner: Mr. Hartlieb?

Mr. Hartlieb: May I have just a second?

Trial Examiner: Sure.

Cross-Examination

Q. (By Mr. Hartlieb): Was October 10, 1955, the first time you ever worked for Morrison-Knudsen Company? A. Yes, it was.

Mr. Hartlieb: I have no further questions.

Trial Examiner: Any questions?

Mr. Latimer: No questions.

Trial Examiner: You are excused.

(Witness excused.)

Mr. Latimer: The General Counsel rests.

Trial Examiner: The General Counsel has rested his case.

What is your pleasure, gentlemen? [222]

Mr. Hartlieb: I move we adjourn to Anchorage.

Trial Examiner: When?

Mr. Morrison: Immediately, and convene tomorrow at the Examiner's pleasure.

Trial Examiner: We will stand adjourned now until 10 o'clock tomorrow morning——

Mr. Latimer (Interrupting): The librarian told me we could not use the library Friday, we can have it Saturday, but we will have to find some place else to convene in Anchorage Friday.

Trial Examiner: In the meantime we will adjourn to the lobby of the Westward Hotel at 10 o'clock tomorrow morning in Anchorage. In the meantime, Mr. Latimer will try to locate a hearing room for us.

Is that agreeable to you, Mr. Latimer?

Mr. Latimer: Yes, sir.

Trial Examiner: And to you, Mr. Morrison?

Mr. Morrison: That is agreeable.

Trial Examiner: And you, Mr. Hartlieb?

Mr. Hartlieb: Yes, sir.

Trial Examiner: We will adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 4 o'clock p.m., Thursday, September 12, 1957, the hearing was adjourned until tomorrow, Friday, September 13, 1957, at 10 o'clock a.m.) [223]

Anchorage, Alaska
Friday, September 13, 1957
Proceedings

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Latimer: Yes, sir.

Mr. Hartlieb: Yes, sir.

Mr. Morrison: Respondent employer is ready, Mr. Examiner.

Mr. Hartlieb: Respondent union is ready, sir.

Mr. Latimer: Mr. Examiner, yesterday I announced on the record that general counsel had rested. However, at that time I did not expect another witness to appear.

Mr. Wyman, who works down at Yakataga, was under subpoena. I tried Tuesday morning, when we recessed here in Anchorage, to notify him not to come up here, however, he didn't get the telegram. He came, and, if it is agreeable to the Examiner, I would like to put Mr. Wyman on and take his testimony inasmuch as he has appeared.

Trial Examiner: Very well.

Will you step forward, sir, and be sworn.

Mr. Morrison: We object to general counsel's case being reopened, he having rested.

Trial Examiner: I will overrule the objection.

Will you step forward, sir.

WILLIAM A. WYMAN

a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows: [229]

Trial Examiner: What is your name, sir?

The Witness: William A. Wyman.

Trial Examiner: Where do you live, Mr. Wyman?

The Witness: Seattle, Washington.

Trial Examiner: You may be seated, sir.

Mr. Latimer, you may proceed with the examination of Mr. Wyman, who has been duly sworn.

Direct Examination

Q. (By Mr. Latimer): Mr. Wyman, did you have occasion to come to Anchorage and seek employment with Morrison-Knudsen in the spring of 1956? A. Yes.

Q. When did you come up here?

A. It was June 12, 1956.

Q. What did you do when you got to Anchorage?

A. Well, I called up the office for Contract 1787 of Morrison-Knudsen and told them I was there as I was directed to do in the telegram.

Q. Previous arrangements had been made for your employment with Morrison-Knudsen, is that correct?

A. Yes, by Mr. Everett Noel, Alaska Freight Lines.

Q. You reported in to Morrison-Knudsen. Tell us your best recollections of what happened when you reported to the Morrison-Knudsen office. Who

(Testimony of William A. Wyman.)

did you see? What was said? Who was present, and when was it? [230]

A. I went down at 8 o'clock in the morning.

Trial Examiner: What date?

The Witness: I believe it was the 13th of June.

Mr. Latimer: 1956?

The Witness: 1956.

A. (Continuing): And I sat down and waited for a while. Then I went in and talked to Mr. Shaw.

Q. (By Mr. Latimer): Who is Mr. Shaw?

A. I believe it was that gentleman sitting over there.

Q. Mr. King?

A. Maybe it was Mr. King. I am not entirely clear on that matter and I can't say definitely as to who I talked to. I was instructed to see either Mr. Erickson, Mr. Pritchard, or Mr. Shaw.

Trial Examiner: Mr. Morrison, will you kindly state for the record, if you know, what Mr. Shaw's first name is?

Mr. Morrison: I am advised that the name is Leonard R. Shaw.

Trial Examiner: Would you ascertain for us what his position with M-K was in June of 1956?

Mr. Morrison: He was not employed by us at that time, so possibly the witness has misrecollected.

The Witness: That's very possible. Now that the name of Mr. King is mentioned, it is kind of familiar.

(Testimony of William A. Wyman.)

Trial Examiner: Will you kindly state for the record Mr. King's first name?

Mr. Morrison: Mr. C. E. King.

Trial Examiner: What was his position with M-K in June of 1956?

Mr. Morrison: Assistant Project Manager for Contract 1787, which was the White Alice Projects.

Trial Examiner: Do you accept that?

Mr. Latimer: Yes, sir.

Q. (By Mr. Latimer): Tell us what happened, Mr. Wyman.

A. At any rate, whoever I talked to asked me a few questions about the football team and what not and told me that the other four men had gone out yesterday and that I would be going out the following day and told me that I would be going too, and told me that I would need a dispatch slip. They said that I would have to get that from the local union, and they said that after I got my dispatch slip, I could go back to the hotel and wait until the following morning when I could take a limousine out to the airfield and take a plane to the job site.

Q. Do you recall whether you talked to a Mr. Brady at the Morrison-Knudsen personnel office?

A. I believe it was a Mr. Brady, yes. If I am not mistaken, the office was shared possibly by Mr. Brady and Mr. King, but, there again, I am not certain. I spent possibly fifteen minutes in the office.

Q. Do you remember who told you that you had

(Testimony of William A. Wyman.)

to go over [232] and get a dispatch slip from the union?

A. I couldn't testify to the exact person who told me that, no.

Q. Do you know whether or not it was someone who appeared to be in a supervisory position——

Mr. Morrison (Interrupting): Objection.

Trial Examiner: I will sustain the objection.

Could you tell us who you now recollect told you about going to the union?

The Witness: Well, I couldn't, to justify both parties, I couldn't honestly——

Trial Examiner (Interrupting): What both parties?

The Witness: Mr. Latimer and Mr. Morrison, I believe. I couldn't honestly——

Trial Examiner (Interrupting): I am not talking about Latimer and Morrison.

The Witness: Well, to answer your question, no.

Trial Examiner: Was it Mr. King or Mr. Brady, one of the two?

The Witness: I would venture to say one of the two, yes.

Trial Examiner: And what is Brady's first name?

Mr. Morrison: Sean.

Trial Examiner: Go ahead.

Mr. Latimer: All right. [233]

Q. (By Mr. Latimer): Tell us what happened.

A. As I said before, they told me I would get a dispatch slip from the union.

Q. Did you go to the union? A. Yes.

(Testimony of William A. Wyman.)

Q. Who did you talk to over there?

A. I have forgotten the name.

Q. This gentleman here, Mr. Groothuis, Mr. Harold Groothuis? A. Yes.

Q. At the union hall? A. That's right.

Q. Did he take your application for membership in the union? A. Yes.

Q. Did you have a conversation with him at that time? A. Yes, we had a conversation.

Q. Tell us what was said.

A. We talked about the football status of the University of Washington and we discussed work generally in Alaska, and then he told me what it would cost a year to join the union and gave me the application blank. He also told me the initiation fees, cost of the initiation fees.

Q. Do you remember what kind of application blank you filled out, to join the union, I mean?

A. I would probably recognize it if I saw it.

Q. I show you what has been introduced in evidence as [234] General Counsel's Exhibit 6 and ask if you can identify that. Is that the type of application you signed when you made the application for membership in the union, do you recall?

A. I believe so.

Q. Did Mr. Groothuis tell you what it was going to cost you?

A. Yes, he told me what the initiation fees were and then I asked him what the yearly dues were.

Q. How much did he tell you?

A. Fifty dollars initiation fee, if I am not mis-

(Testimony of William A. Wyman.)

taken, and it was $48, or was at that time, a year, $6 during a certain period and $2 a month during another period.

Q. Did you make arrangements to pay those dues and fees at that time? A. Yes.

Q. What arrangements did you make?

A. Well, I told him that I didn't have the year's dues or the initiation fee at the present time and he said that when I got out on the job I could give it to the dispatcher, or the union, I could give my dispatch slip and my fees to the union representative out there.

Q. Did you do that? A. Yes, sir.

Mr. Latimer: Your witness.

Trial Examiner: Any questions, Mr. Morrison?

Cross-Examination

Q. (By Mr. Morrison): Mr. Wyman, you say you can not recall who you talked to from Morrison-Knudsen?

A. I couldn't say to be absolutely sure, no, because I didn't pay any attention to it, and the fact that my association with him was pre-arranged, limited, and I knew that I would soon be on my way and probably have no contact with the man again.

Q. In the course of — this conversation lasted how long with the Morrison-Knudsen person you talked to?

A. At the utmost, fifteen minutes.

Q. Can you state whether in fact you asked him

(Testimony of William A. Wyman.)

about whether you could join the union or whether he asked you, told you to join the union, do you recall that?

A. Certainly. Nobody told me to join the union. At no such time did I ever feel that there was anybody telling me to join the union. I came to Alaska with idea that I would join the union because I intended to work here during the summer, or just as long as I can, because it is the only way I can go to school, and I know that Alaska is in effect not a closed shop and that I didn't have to join the union.

Q. You knew you did not have to?

A. Certainly, I was aware of that.

Q. So would you characterize the conversation with this Morrison-Knudsen representative concerning your joining the [236] union as his directing you where to join the union? A. Yes.

Q. But you joined the union of your own volition?

A. I can honestly state that nobody told me to join the union.

Q. And was it after you inquired and indicated, if you did, that you were going to join the union, that he sent you there for a dispatch slip? By "he", I mean the person who was interviewing you.

A. There, again, I would say it was just a mutual understanding. I had been told before by many people that I would be in the union when I came to Alaska, and I am sure that if Mr. Brady or

(Testimony of William A. Wyman.)

Mr. King were the ones I talked to, why, they assumed, possibly, that I would join the union.

Q. I don't want their assumptions. I want what you recall they told you and you told them.

A. I told them nothing. They told me that as soon as I got my dispatch slip that I would be free for the rest of the day. Now the word "union" was never mentioned, not while I was at the office.

Q. What was the dispatch slip for, then?

A. A dispatch slip from the union, but the words, "joining the union" were never mentioned. I can say that.

Q. When you went up to the union to get a dispatch slip, did you ask them whether you could get a slip without joining? [237]

A. No, I didn't.

Q. Did you know whether you could get a slip without joining?

A. No, I didn't know that many details about it. I knew that a person was free to work without joining the union, but I didn't know that he could get the dispatch slip.

Q. Then you did not ask whoever interviewed you from M-K if you could go to work without going through the union, did you?

A. No, I didn't do that.

Mr. Morrison: I have no further questions.

Cross-Examination

Q. (By Mr. Hartlieb): Mr. Wyman, in your own mind, did you have a job when you came to Alaska? A. Yes.

(Testimony of William A. Wyman.)

Q. Directing your attention to your conversation with Mr. Groothuis on the 13th of June, 1956, did Mr. Groothuis tell you that you had to join a union? A. Definitely not.

Q. Do you remember who first brought up the —when you were talking to Mr. Groothuis, I gather from you direct examination that you first visited and discussed the football situation at the University of Washington, do you recollect who first brought up the subject of the union? Whether it was yourself or Mr. Groothuis? [238]

A. I couldn't answer that in all fairness to both of us. I couldn't be that positive on it.

Q. But you are sure that Mr. Groothuis never told you you had to join the union?

A. I can definitely testify to that.

Trial Examiner: What was the first thing you said to Mr. Groothuis when you met him the first time?

The Witness: Of any significance?

Trial Examiner: Yes.

The Witness: I should assume——

Trial Examiner (Interrupting): Not what you assume, what you recollect.

The Witness: I don't recollect saying——

Trial Examiner (Interrupting): Did you tell him why you were there?

The Witness: I possibly might have.

Trial Examiner: What is your best recollection? Now, take a few minutes and just see what you recollect.

(Testimony of William A. Wyman.)

Mr. Hartlieb: May I ask the witness a question?

Trial Examiner: Wait a minute until he answers mine, please.

The Witness: I would recollect that I asked him something pertinent to the joining of the labor union.

Trial Examiner: Did you tell him why you came to the union, what you wanted to get? [239]

The Witness: I believe that I might have stated that I came for a dispatch card.

Trial Examiner: You didn't go there to sell magazines, did you?

The Witness: No, I didn't go there to sell magazines.

Trial Examiner: With that understanding, now, can you remember how you introduced yourself?

The Witness: I probably introduced myself as Mr. Wyman and said I was after a dispatch slip to Aniak.

Trial Examiner: That's your best recollection?

The Witness: I would say so.

Trial Examiner: Go ahead, Mr. Hartlieb.

Mr. Hartlieb: I have no questions.

Trial Examiner: Mr. Latimer, any questions?

Redirect Examination

Q. (By Mr. Latimer): While you were at the M-K building talking to Mr. Brady or Mr. King or whoever you talked to there, did you recall whether or not the gentleman you talked to made a phone call to the labor union?

(Testimony of William A. Wyman.)

A. Yes, he did.

Q. Tell us what you remember about that.

A. He called and said that, "We have a man up here, Bill Wyman, and he is going out to Aniak to work, and he needs a dispatch slip."

Q. Do you know who he talked to at the labor union? [240] A. No, I don't.

Q. Does the name "Harold" mean anything to you?

A. I know Harold McFarland, only because he happens to sign my card.

Q. Does "Harold Groothuis" mean anything to you?

Mr. Hartlieb: Your Honor, I object to this. I don't see the relevancy of this.

Trial Examiner: Overruled.

A. Not the particular incident you are talking about, Mr. Latimer.

Q. (By Mr. Latimer): What is your best recollection of the telephone conversation made between Morrison-Knudsen's office and the union at the time you were there?

A. Well, Mr. Brady or Mr. King just called up on the phone and asked for the union office. I believe they had an operator who gave them the union office, and other than that——

Q. (Interrupting): After you got over to the union hall, did you talk to this man "Harold"?

A. Yes, sir.

Q. Is this the gentleman here that you talked to, Mr. Groothuis? (Indicating Mr. Groothuis.)

(Testimony of William A. Wyman.)

A. Yes.

Q. Do you recall your statement to him about college students being members of the union?

A. Yes, I can recall conversation with him. [241]

Q. Tell us your best recollections of that conversation.

A. Well, that was before I filled out the application. I had asked him about the dispatch slip and he said, "Well, we will get the dispatch slip for you as soon as we fill out the application." And, he said, "We would like for you to join the union this summer since the halls are terrifically filled up and we are putting you people out on the job," which was obviously in front of the fellows who were waiting, I should believe, and he said, "We would like for you to join the union." I believe I said, "Certainly. I came up here with the intention of joining the union."

Mr. Latimer: That's all.

Trial Examiner: Any questions?

Mr. Morrison: No questions.

Trial Examiner: Mr. Hartlieb?

Mr. Hartlieb: No questions.

Trial Examiner: You are excused, Mr. Wyman.

(Witness excused.)

Trial Examiner: Have you any other witnesses you wish to call at this time?

Mr. Latimer: General counsel rests, Mr. Examiner.

Trial Examiner: What is your pleasure, Mr. Morrison?

Mr. Morrison: Well, the respondent, Morrison-Knudsen, will proceed then with the defense.

Trial Examiner: Beg pardon? [242]

Mr. Morrison: I would first like to make a motion to dismiss this proceeding against the respondent, Morrison-Knudsen, for the reason that there has been no evidence in support of any facts which would constitute a violation as specified in the complaint as issued by the general counsel.

Mr. Latimer: Of course, I will object to that, Mr. Examiner.

Trial Examiner: That's denied.

Mr. Hartlieb: Mr. Trial Examiner, I would like to make a motion to dismiss on behalf of respondent Local 341, on the grounds that they haven't proved there was any tacit understanding or agreement between the respondents as alleged in the complaint. There is no proof that there is any compulsion or coercion on the part of 341 either as to discriminaties or as to respondent, Morrison-Knudsen.

Trial Examiner: Before I rule on that motion, could the parties stipulate the approximate number of employees at the Big Mountain project who came under the jurisdiction of Local 341, that is, the approximate number of employees during the months of June, July, August, and September, 1956?

Mr. Hartlieb: May we go off the record a minute, Mr. Examiner?

Trial Examiner: All right. Off the record.

(Discussion off the record.)

Trial Examiner: On the record. [243]

Mr. Hartlieb: If I may, I would like to have a further stipulation. It is a part of this stipulation, actually. We have a record of the people that worked out there that were union people and which were not union members. I think that probably would be——

Trial Examiner: I only wanted the approximate number in order to rule upon your motion to dismiss. Now will you just let it go at that?

Mr. Hartlieb: Yes, sir, sorry, sir.

Trial Examiner: And I understand the parties are willing to stipulate that during June, July, August, and September, 1956, the number of laborers coming within the jurisdiction of Local 341 ranged from nineteen to forty-four. Is that correct?

Mr. Latimer: That's agreeable to me, Mr. Examiner.

Mr. Morrison: That's correct, Mr. Examiner.

Trial Examiner: Do you so stipulate, Mr. Hartlieb?

Mr. Hartlieb: I so stipulate.

Trial Examiner: I will grant Mr. Hartlieb's motion to dismiss.

Mr. Latimer: I object to that.

Trial Examiner: The only evidence which might tend to tie in the union with the allegations of the complaint is some testimony by Denton R. Moore, and it seems strange to me that he was the only witness who testified that he was told to join [244]

the union by any official of the union before he could go to work, and, even if it is so, and I am not passing upon that point because I don't think it is necessary, it is only an isolated incident and I see no reason to put the union to its proof or its defense. Therefore, each and every allegation of the complaint with respect to the union is hereby dismissed.

Mr. Hartlieb: Thank you, Mr. Hearing Officer. As I understand it, we can be excused from the hearing at any time?

Trial Examiner: Certainly.

Mr. Morrison: In view of the Hearing Officer's ruling, may we confer briefly?

Trial Examiner: We will take a short recess. Let me know when you are ready to proceed.

(Short recess.)

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Morrison: We are ready to proceed, Mr. Examiner.

Mr. Latimer: Let the record note my exception to the ruling.

Trial Examiner: Will you call your first witness, please?

Mr. Morrison: Mr. Einar Erickson will resume the witness stand.

You have already been sworn?

Mr. Erickson: Yes, I have. [245]

EINAR W. ERICKSON

a witness called by and on behalf of the Respondent, having been previously sworn, was recalled and testified as follows:

Direct Examination

Q. (By Mr. Morrison): I believe it is in the record that you are District Manager for the District of Alaska for M-K. A. Yes.

Q. Is that the top executive position for Morrison-Knudsen in the Alaska district?

A. It is.

Q. And what is the scope of your authority in that position and the nature of your duties?

Trial Examiner: You mean at the present time, or in the spring and summer of 1956?

Q. (By Mr. Morrison): When did you become District Manager?

A. I think about 1954 or 1953. I was District Manager at the time of this particular incident.

Q. You were District Manager in 1955 and 1956 and to date? A. Yes.

Q. Have your duties remained the same?

A. Yes, sir.

Q. State generally what the scope of your authority and nature of your duties are.

A. Subject only to direction from the General Manager of the company in Boise, Idaho. Except on incidental matters [246] from time to time, I am complete boss of everything that goes on up here. By everything, I mean policy, direction and so forth.

(Testimony of Einar W. Erickson.)

Q. Mr. Erickson, are you also associated with the Associated General Contractors? A. I am.

Q. What is the Associated General Contractors?

A. A national organization of contractors in the construction business.

Q. Does it have a local chapter?

A. It does.

Q. And that is designated as what?

A. The Alaska Chapter, Associated General Contractors.

Q. Do you have a position in that organization as an individual? A. I do.

Q. I take it that M-K is a member of that organization. A. Yes.

Q. What is your position as an individual with the Alaska Chapter?

A. I am a director of the Alaska Chapter.

Q. Do you have any functions in the negotiations of contracts? A. I do.

Q. And what is that function? [247]

A. Well, the directors constitute the negotiating committee of the Alaska Chapter of AGC. I can be wrong on that because I have also attended or given my proxy to someone to attend and take it as a matter of course. I think all directors are one and the same as a negotiating committee, however.

Q. Mr. Erickson, who establishes the employment policies for Morrison-Knudsen Company?

A. In Alaska?

Q. Yes. A. I do.

Q. When I refer to anything involving Morri-

(Testimony of Einar W. Erickson.)

son-Knudsen Company, until otherwise specified, I am referring to the Alaska operations in the Alaska District.

Mr. Erickson, describe the nature of work that Morrison-Knudsen does.

A. All types of construction. We are general contractors. We do heavy construction and building construction.

Q. What do you mean by "heavy construction"?

A. Heavy construction is grading work, paving work, tank work, everything in the way of construction, actually, that isn't building a building.

Q. Does it for the most part involve moving dirt, rock?

A. A great bulk of our heavy construction effort is moving dirt and rock and pavement.

Q. What type of equipment do you utilize in that type of construction?

A. Power shovels, tractors, graders, compressors, rock drills.

Q. Is this equipment expensive? A. Very.

Q. Where do you get employees to operate this equipment in your employ usually?

A. We get our operators almost entirely from the union halls.

Q. And why do you get them almost entirely from the union halls?

A. The most skilled, best trained people come out of the halls. The equipment is valuable, and to take a power shovel which costs $125,000, you

(Testimony of Einar W. Erickson.)

are not going to get an unskilled person on that shovel.

Q. Do you get direct applications from individuals for positions? A. Once in a while.

Q. Are those persons hired?

A. Very seldom unless we know them, know their history and background.

Q. If you know them——

A. (Interrupting): If we know them and need a man, we hire them.

Q. Now, what, insofar as you are concerned, is the union's [249] function when you request men from them? A. To give them to us.

Q. What do you mean by "to give" them to you?

A. Well, if, as an example, we want a particular shovel runner to do a particular job, we call the union and want the shovel runner. They go out and find the man and dispatch him to us.

Q. Do they also serve another function if you do not have a particular shovel runner in mind?

A. If we don't make a name call or if the name call that we make is unavailable, they try to select the best and most capable man they have to give to us.

Q. Do you find their selections reliable from the standpoint of the skill and capabilities of the employees supplied for the specified job?

A. Yes.

Q. You mentioned "name calls." Why do you call the union for an individual whom you have

(Testimony of Einar W. Erickson.)

in mind to employ rather than contacting the individual directly, if you do?

A. Among other things, the union has generally got a better knowledge of where to locate that employee in a hurry than we do.

Q. Now, Mr. Erickson, what is the policy of Morrison-Knudsen Company insofar as requiring or not requiring union membership as a condition of employment? [250]

A. We have no requirement that a person to be employed be a member of a union, nor do we stipulate that he shall become a member of the union if he isn't one.

Q. To your knowledge, has anyone been refused employment because they did not or would not belong to the union?

A. I have no recollection of a single case of that happening since I have been in Alaska.

Q. Now, when you called the union to supply men, either named or unnamed, it is my understanding that the union gives that man a dispatch slip. What is the function of the dispatch slip insofar as you are concerned?

A. Well, I personally don't worry too much myself about dispatch slips, so I can only believe that the dispatch slip would be an indication that that is the man that the union sent to us. If he didn't have a dispatch slip, we would have fourteen guys on our porch every morning saying they had been sent by the union and they are the one we are supposed to take.

(Testimony of Einar W. Erickson.)

Q. In other words, a dispatch slip is a method of control and identification of the man whom the union supplies? A. That is correct.

Q. Do you know whether the dispatch slip indicates that the man is or is not a member of the union? A. No, I don't know that.

Q. When you receive a dispatch slip, do you make any inquiries as to whether in fact the man is or is not a member of the union? [251]

A. No.

Q. Now in the early part of 1956, what was the nature of the employee requirements? By early part, I mean, well, first let me ask, when did you start construction work in 1956?

A. Oh, I think we began to hire in March, rather a slow build-up. It became quite heavy in May. It gradually built up from March on.

Trial Examiner: This is at Big Mountain?

Mr. Morrison: This is generally now, Mr. Examiner.

Trial Examiner: Okay.

Q. (By Mr. Morrison): And what was the type or classification of employees who were hired in March?

A. Generally, in March we were hiring operators, particularly tractor operators, and were beginning to shove the snow out of the way so we could uncover the camps so we could get ready to go on all of our jobs. Then, repair mechanics, oilers, cooks, a few carpenters.

(Testimony of Einar W. Erickson.)

Q. And what is the major source of supply of these employees? A. The union halls.

Q. Now, Mr. Erickson, when was Mr. Wargny employed as Personnel Director on the 1787 White Alice project?

A. I can't give you the date, I don't know.

Q. I believe he testified the other day that it was in March of 1956. Is that approximately correct? [252]

A. I believe so.

Q. Did he have prior experience in Personnel with you as Alaska Manager of Morrison-Knudsen?

A. I personally have no recollection of his prior work in Personnel with Morrison-Knudsen in Alaska.

Q. And how long was Mr. Wargny in the position of Personnel Director?

A. Several months. I don't remember the date of his termination. It seems to me it was somewhere around July or August.

Q. Was his termination voluntary or involuntary? A. Involuntary.

Q. Mr. Erickson, you heard Mr. Wargny's testimony the other day, did you not, concerning his assumption that new hires had to be dispatched through the union? A. Yes.

Q. Were you aware of his having such an understanding? A. No, I wasn't.

Q. Did you ever instruct him to have all new hires dispatched through the union? A. No.

(Testimony of Einar W. Erickson.)

Q. Was it the policy of Morrison-Knudsen at that time——

Mr. Latimer (Interrupting): Mr. Examiner, I am going to object to counsel leading the witness. I want his story, but I would rather have him testify about it. [253]

Trial Examiner: Don't lead him.

Q. (By Mr. Morrison): Was it or was it not the policy of Morrison-Knudsen to—what was the policy of M-K in connection with new hires as related to union membership requirements?

A. As far as new hires and membership requirements in a union was concerned, there was no relation. We have never been bound to hire only union people.

Q. Have you ever had any agreement or any negotiations with the union in recent years, or at least in 1955 or 1956, concerning any such requirement?

A. We had no agreement. I told the union what we were going to do in the spring of 1956.

Q. What do you mean, you told them what you were going to do?

A. Well, I called a meeting in my office early in 1956, the exact date escapes me, but it was prior to the build-up, and outlined to them the total manpower requirements that I thought we were going to have in all of our work in Alaska for the year. I told them that I expected to obtain totally unskilled or casual labor wherever possible at the work sites, and I told them that it was my best

(Testimony of Einar W. Erickson.)

estimate that we would be calling on them for around two thousand to twenty-five hundred men total to cover all of our work.

Q. And this was the only conference you had with the union concerning employment? [254]

A. Yes, sir.

Q. That is the policy of Morrison-Knudsen?

A. Yes, sir.

Q. Now, Mr. Erickson, you have heard the testimony of certain college students from the United States who were employed by Morrison-Knudsen. Who hired these college students? A. I did.

Q. Did you personally direct that they be hired?

A. I did.

Q. And at the time you directed that they be hired, to whom did you send such a direction, instructions, or authorization?

A. In the case of the boys that were related to Mr. Wargny of the University of Washington, Mr. Wyley wrote me a letter and asked me what I could do for some of his athletes and I wrote back and, if I remember, I told him I would hire some. I believe I told him a number.

Q. And in that letter, was there any condition, not a condition, concerning the requirement that they join a union? A. No.

Q. Was there any such requirement?

A. No.

Q. Do you have an explanation of why, assuming it was a fact, that Mr. Haugen contacted the union when these men reported? [255]

(Testimony of Einar W. Erickson.)

A. I haven't the faintest idea why he did it, if he did it.

Q. Do you have an explanation of why he might have done it?

A. No, we have always notified the union when we took on non-union people, of course. They are responsible for them out on the job, so I assume they are entitled to know who we hire.

Q. Do you feel that your company's commitment to hire these men was made before or after they reported?

A. The commitment was very, very firmly made when I wrote——

Trial Examiner (Interrupting): Have you got the copy of the letter you sent Mr. *Wargny?*

The Witness: I don't know, Mr. Examiner, whether we keep a file—may I go off the record for a moment?

Trial Examiner: No.

The Witness: I don't know whether we have a copy or not.

Mr. Morrison: We will make an examination, Mr. Examiner.

Q. (By Mr. Morrison): Now, Mr. Erickson, there has been testimony that it was the policy of Morrison-Knudsen to have all new hires cleared through the Anchorage office. Can you explain whether that is a correct statement of the policy as it existed in 1956? [256]

A. Yes, the clearance, however, relates to a co-

(Testimony of Einar W. Erickson.)

ordination of manpower from various work locations to other locations.

Q. Would you explain the problems of central clearance?

A. Yes, sir. I will give a hypothetical case of a site at Newenham and Big Mountain as two sites. If we had twenty laborers who were skilled in rock work at Newenham and were about to hire twenty laborers requiring rock work skill at Big Mountain, rather than go to the expense of transporting twenty laborers from Newenham back to Anchorage and then take twenty new hires from Anchorage down to Big Mountain, we coordinated so that the twenty people would go directly from Newenham down to Big Mountain. We were constantly trying to keep the most skilled people on the payroll and constantly trying to shuffle them from job location to job location rather than taking on a new batch of people who had no previous experience with us, so we required a clearance through the Anchorage Personnel Section in the case of any new hires.

Q. Were there exceptions to this central clearance policy?

A. Yes, because new hires could be picked up at the job location, if they were available, for special chores wherein the man was not to be told, "We are taking you aboard now and if your work is all right, we are going to have you for the next five months," We had a lot of that, barge unloading at various places throughout Alaska, and if there was a pool [257] of people available there,

(Testimony of Einar W. Erickson.)

we allow the site superintendent or the project superintendent to go ahead and hire local people.

Q. What was your policy as to hiring local people?

A. Any time that we could find local people with requisite skills and the qualifications to do the job at hand, we will hire them.

Q. What is the fact as to whether or not there are people—strike that.

Mr. Morrison: I would like to have this marked as Respondent's Exhibit 1.

Trial Examiner: Will the reporter kindly mark the paper as Respondent's Exhibit No. 1 for identification.

(Thereupon the paper above referred to was marked Respondent's Exhibit No. 1 for identification.)

Mr. Morrison: Respondent's Exhibit No. 1 is a map of Alaska prepared by the U. S. Department of Interior and I request it to be introduced for illustrative purposes.

Mr. Latimer: No objection.

Trial Examiner: There being no objection, the paper will be received in evidence and I will kindly ask the reporter to mark it as Respondent's Exhibit No. 1.

(The paper heretofore marked Respondent's Exhibit No. 1 for identification was received in evidence.)

Q. (By Mr. Morrison): Insofar as you can, Mr. Erickson, will [258] you mark the approximate

(Testimony of Einar W. Erickson.)

locations of the construction Morrison-Knudsen had in the process in 1956 on Respondent's Exhibit No. 1? A. Yes.

Q. What spot are you marking as number 1?

A. Cape Lizburne.

Q. And what spot is 2? A. Nome.

Mr. Latimer: Are those the job site numbers you are putting on there?

Mr. Morrison: No.

Q. (By Mr. Morrison): And what spot are you marking as 3? A. Bethel.

Romanzoff, number 4.

Five is Iliamna Lake area.

Six is King Salmon.

Seven is Anchorage.

Eight is Galena.

Nine is Tanana.

Ten is Fairbanks.

Eleven is Margot or Tatalena is the proper name where we were working.

Twelve is Aniak.

Thirteen is Newenham.

Q. I think it will be unnecessary to designate all of them, if that is a general representation——

A. (Interrupting): It is a good start. [259]

Q. Now——

A. (Interrupting): Fourteen is Akiak.

Q. As to the locations of those construction sites which you have indicated, excluding Anchorage and Fairbanks, what is the fact as to the availability

(Testimony of Einar W. Erickson.)

of employees capable of doing the jobs which are required?

A. Generally speaking, there is a small group of unskilled labor at hand. Skilled people are virtually totally unavailable. Once in a while you run into an occasional one, but generally they are good for the strong back work, but they have no special skills.

Q. Within the classification of laborers as represented by Local 341, does that term designate the type of workers you described as "strong back" workers, or does that term include something different?

A. Well, in the laborers classifications, most of those are skilled laborers classifications. They perform strong back work in addition to it.

Q. I am referring to General Counsel's Exhibit No. 5, which is the 1956 AGC, AFL Alaska Master Labor Agreement. I refer you to Schedule A appearing on page 21. Is that a breakdown of the various classifications included within the laborers local? [260] A. It is.

Q. Of those classifications, how many require some skill, and would you explain the distinctions, if there are any?

A. I would say offhand all but five or six of the total classifications require skill. It is easier to say those which don't.

Q. Of those classifications, how many would you expect, from your experience, to find competent

(Testimony of Einar W. Erickson.)

employees to fill at the outlying site locations you have designated on Respondent's Exhibit 1?

A. Very few of these skilled labor classifications would you find living at the jobsites. The only ones that you could expect to find would be such as your building laborers classification or your general labor classification, brush cutters, ditch diggers, and not too many of those.

Q. What is the makeup of those people who live locally at the jobsite?

A. Most of them earn their living fishing, trapping.

Q. What are they? Are they natives? white people?

A. Some of them are natives. I would say the bulk of them are natives or part native. Once in a while you find white men there.

Q. Now, would you explain, taking the classifications on Exhibit 5 there, the nature of some of the classifications which Morrison-Knudsen would hire other than general laborers and the nature of their duties? [261]

A. Yes. One of the first ones that we were hiring was form strippers. A good form stripper will go in and remove the concrete forms rapidly and carefully, and, if he does his job right, you are able to use the forms to make a second or third or a fourth or sometimes six concrete pours using the same forms. If they are not taken off properly, you just go out and build more forms and spent some more money.

(Testimony of Einar W. Erickson.)

We use a lot of jackhammer operators. He has a machine which costs $400 or $500. A good one can get you maybe up to two hundred feet of drill hole a shift and a poor one would get you twenty feet. In other words, a good one would get you ten times as much as a poor one would.

Power buggy operator is another one we use. He handles the concrete from the mixer into the forms. A power buggy is worth $1500 and takes a considerable amount of skill to handle one of them.

Going on down, a powder man is, I would say myself, the most skilled of all the labor classifications in that he does the job right, breaks the rock up, and he doesn't kill anybody, including himself. If he does it wrong, you generally have several dead people around.

A wagon driller is another one we use a lot of. They operate a machine which is again worth about $2500. A good wagon driller again will get you two hundred feet and a poor [262] one would get no hole drilled for you.

Q. Does it generally cover the classifications which M-K utilizes? A. Yes.

Mr. Morrison: I would like Respondent's Exhibit 2 to be identified.

(Thereupon the map above referred to was marked Respondent's Exhibit No. 2 for identification.)

Mr. Morrison: Respondent submits for admission Exhibit No. 2, which is an Alaska reconnais-

(Testimony of Einar W. Erickson.)

sance topographic map of the Iliamna area of the Territory of Alaska.

Trial Examiner: Any objection?

Mr. Latimer: No objection.

Trial Examiner: There being no objection, the papers are received in evidence, and I will ask the reporter to kindly mark it as Respondent's Exhibit No. 2.

(The map heretofore marked Respondent's Exhibit No. 1 for identification were received in evidence.)

Q. (By Mr. Morrison): I am submitting to you, Mr. Erickson, what has been designated Respondent's Exhibit 2, which is a map of the Iliamna area of the Territory of Alaska. I note that you have designated on Respondent's Exhibit 1 at location number 5 Iliamna Lake as a site of some construction. Would you point out in greater detail on Exhibit 2 the location and nature, to the [263] extent security permits, of the construction at Iliamna Lake?

A. The main site of work and the objective of all work is at Big Mountain. We were building a military facility.

Q. Will you circle Big Mountain and designate it with a 1?

A. Yes. (The witness so designated on Exhibit No. 2.)

A. (Continuing): In order to accomplish the construction at Big Mountain, we built a camp about nine miles away from the actual working site. I will mark the camp. From that camp we

(Testimony of Einar W. Erickson.)

built a road to a place where we could build an airfield. We built the airfield and continued a road on up to the construction site. I will mark that airfield. In order to accomplish these three things, namely, building a camp, building roads, and building an airstrip so we could get to the site, we were working at many other locations in the area——

Q. (Interrupting): Will you give us a chronological statement of the course of the construction with reference to the map?

A. Yes. We started at Iliamna Bay with equipment barged in.

Q. When was this done?

A. I believe in the late fall of 1954. [264]

Q. Wasn't that the fall of 1955?

A. The fall of 1955, correct, we began to reconstruct an old portage through to the point where it could be utilized to haul some fifteen hundred tons of equipment. That road I will mark on here as "portage road."

Q. What was the nature of your labor requirements at that time?

A. That was almost all either rock drillers or equipment operators.

Q. Was there any general labor requirements at that time?

A. Virtually none. I imagine there was some casual labor, but the job was mostly drilling and shooting rock and removing that rock with heavy equipment.

(Testimony of Einar W. Erickson.)

Q. By "shooting rock," you mean by the use of explosives?

A. Yes.

About the same time as this work at the portage road, we had barge equipment up there from King Salmon and had gone in to Iliamna, which was the original location of the White Alice site. We came in here to the original location. I will mark that. We came in with heavy equipment to build a piece of road and to do site grading and the site failed to test out technically so they could get proper signals. The Western Electric started testing work on top of Big Mountain here as an alternate and after we milled around Iliamna for two or three weeks, they decided to move the site to Big Mountain, [265] so that batch of equipment came on over here——

Mr. Latimer (Interrupting): You mentioned Western Electric. Were they the prime contractor and Morrison-Knudsen the subcontractor?

The Witness: Yes.

Q. (Continuing): So we brought that equipment over here to the camp location.

Q. (By Mr. Morrison): When was this?

A. That again was in the fall of 1955.

Q. Was there some requirement of general labor at that time?

A. Again only to a very minor per cent. You can use general labor to help get your equipment off the barge, however, we had operators along who did most of that barge loading at that time,

(Testimony of Einar W. Erickson.)

and you had the setup of camp. There is some unskilled labor, but to only a minor degree.

So, we moved over in here and we were at work starting on roads. We were at work up here in the fall of 1955.

Q. By "up here," you mean portage road?

A. Portage road, yes.

Sometime along about November or December we had succeeded in punching a winter airstrip out and we had succeeded in getting a tractor to the top of Big Mountain, just pioneering a road up there. She shut down because of extremely adverse weather and went back in there in the early [266] spring of 1956. When we went back in, we went to both locations again, the portage road work and the main location down where I have marked, Big Mountain.

Mr. Latimer: Mr. Examiner, may we take a couple of minutes' recess so we can cancel our seat on that 1 o'clock airplane?

Trial Examiner: Supposing we adjourn now for lunch. Is that agreeable to you, Mr. Morrison?

Mr. Morrison: Yes.

Trial Examiner: We will stand adjourned now until 1:15.

(Whereupon a recess was taken until 1:15 o'clock p.m.) [267]

After Recess

(Whereupon, the hearing was resumed, pursuant to the taking of the recess, at 1:15 o'clock p.m.)

(Testimony of Einar W. Erickson.)

Trial Examiner: Are you ready to proceed?

Mr. Morrison: Respondent is ready, Mr. Examiner.

Trial Examiner: Is general counsel ready?

Mr. Latimer: Yes, sir.

Mr. Morrison: Would the reporter read back the last question at the time of recess.

(The question was read.)

Q. (By Mr. Morrison): Mr. Erickson, at the time you went back to both locations in the spring of 1956, what was the nature of the work to be done then?

A. On the portage road, we still had repairs to complete prior to wanting to move sizable tonnages of material over it. At the main location, Big Mountain, we had a permanent road built from the camp to the airstrip location. We had an airstrip to build and we had a road to build from the airstrip to the top of the mountain, plus, of course, completing the site eventually.

Q. What was the nature of your personnel requirements at that time?

A. Almost one hundred per cent operating engineers, teamsters, and rock drill men.

Q. Then what was the next significant development in [268] construction insofar as labor requirements are concerned? By "labor," I mean generally all working men.

A. The most significant next change in labor requirements was when we accomplished the con-

(Testimony of Einar W. Erickson.)

struction, the completion of the road and airstrip and got up on top of the mountain. We were then in a position to move equipment using that type of workman up to the portage road where we could start the transportation of material from Iliamna Bay over to Pile Bay and thence by barge down to Big Mountain.

Q. Do I understand that the actual unit to be constructed was to be located on top of the mountain and all of this other work was to gain access to the place of construction?

A. That is correct.

Q. Was there some event that changed the proposed schedule of construction during the spring and early summer?

A. Yes, there was. I had a project manager by the name of Robert Peterson in overall charge of White Alice. Immediately under him was a man by the name of Ralph Pritchard who was area superintendent of three or four locations, one of which was site 2, and then Bruce Shumway, who was the actual site superintendent. I received word late in May or early in June to the effect that great difficulty was going to be encountered in constructing the access road and the airstrip at Big Mountain and that Mr. Peterson and Mr. Pritchard recommended that we put part of the crew up at [269] portage road to start hauling materials down. When I got the word, I was opposed to it, but decided to go immediately on down to the actual location of the work and look into it

(Testimony of Einar W. Erickson.)

myself. While there I made a decision which I conveyed to the site superintendent, to Mr. Pritchard, and to Mr. Peterson that we were not going to split any part of the equipment or the crew, that we were going to keep them building the airfield and the permanent access road, and when, and only when, that was completed, that we would move back up to portage bay to start the transportation of material.

Q. Would that have an effect on their previous estimate of personnel requirements, both to be imported and hired locally? A. Yes, it would.

Q. What effect would it have?

A. The effect would be this. If they were going to be running a spread of men at portage bay, or the portage road rather, and transporting material at the same time they ran a spread of men and equipment at Big Mountain, they would have a greater need for totally unskilled labor at an earlier date. In other words, the loading or the unloading of a barge at Iliamna Bay, plus the loading of barges at Pile Bay, to go on down the lake, plus the unloading of barges at Big Mountain was all work of a highly unskilled nature and had allowed them to operate at portage road at this early date, they would [270] have required more unskilled labor.

Q. Now, when was the date of completion of the road to the top of Big Mountain and the consequent conduct of the portage and transport of material?

(Testimony of Einar W. Erickson.)

A. It was right at the tail end of July or the early part of August.

Trial Examiner: 1956?

The Witness: 1956.

Q. (By Mr. Morrison): What effect did this have on the type of labor requirement that was needed?

A. Well, again, as soon as they had carried out my instructions to complete that work before they diverted equipment back up to portage road, then at that date they began to need unskilled labor.

Q. And, to your knowledge, did they at that time hire unskilled labor? A. Yes.

Mr. Latimer: What was the date of that?

Mr. Morrison: The end of July or early August.

Q. (By Mr. Morrison) And what was the nature of the work that was done by this laborer?

A. Unloading barges at Iliamna Bay, loading barges at Pile Bay, and unloading barges at Big Mountain.

Q. Can you estimate the amount of material that was moved in that operation? [271]

A. I believe we transported by that method something like fifteen hundred tons. I am not positive, however.

Q. Were there other transporting of cargo operations other than the portage bay operation?

A. Yes, on a small scale there were. I think we took some oil deliveries, barreled oil, that was brought up the Kevichak River to Igiugig, and once in a while we would have an airplane that, prior to the

(Testimony of Einar W. Erickson.)

completion of our strip at Big Mountain, had to land at Iliamna across the lake and then we would send a small barge over to get that, and labor was involved on picking the materials up and getting them down onto that barge. These operations were of a very minor magnitude. I doubt that there was three hundred tons handled that way. I couldn't say definitely, but they were relatively incidental.

Q. Mr. Erickson, in starting the season's construction as you did in 1956 for work as was accomplished on Iliamna Bay, what are the considerations in selecting a crew?

A. Well, the considerations are what is the work you are going to do, and, in this case, the work we were going to do first was to build the access road and the airstrip. So, you would look for the type of employee who was best qualified to do that work.

Q. Does an employee necessarily have to be limited to one classification?

A. No, they are not. As a matter of fact, going over to [272] your wagon drill operator in the laborers group, as a rule those fellows are jackhammer men also, and many of them are powder men, and most of them are pretty good hands on lake culverts, that being the work that they normally do on a road job when there is no rock to drill.

Q. Are those skills available on a local basis at the various sites that you have indicated on Respondent's Exhibit 1? A. As a rule, no.

Q. Do you know of any case where someone

(Testimony of Einar W. Erickson.)

with that construction skill did happen to live in the area where you were building? A. No.

Q. So from where must these people be supplied?

A. They must be supplied—in this case, they were supplied from Anchorage.

Q. Did the fact that—strike that. Was there any consideration given whether these men belonged to the union or not in determining who was first employed?

A. You mean the men that came out of Anchorage?

Q. Yes.

A. I think we called the union to get the men out of Anchorage.

Q. In selecting laborers at the early part of the construction, was any consideration given to the fact that the [273] laborers from Anchorage might be union men and the local natives frequently were not?

A. The only consideration given at that date was to the skills required.

Q. What is the policy of Morrison-Knudsen in connection with hiring local residents or natives?

A. We always have hired local people wherever practicable, providing that the skills that they have are suitable for the work at hand, the reason being that it is cheaper to do so.

Mr. Morrison: I have no further questions.

(Testimony of Einar W. Erickson.)

Cross Examination

Q. (By Mr. Latimer): Mr. Erickson, what skills are necessary to be a common laborer?

A. To be a common laborer requires, I believe, no skill. A common laborer, as we define it, is one who, if you have got a two by four that needs to be picked up here and put over there——

Q. And dig a ditch?

A. No, not necessarily dig a ditch.

Trial Examiner: Are they referred to sometimes as people with strong backs and weak minds?

The Witness: Yes, sir.

Q. (By Mr. Latimer): Well, then, what did you mean a moment ago when you said the policy of Morrison-Knudsen was to hire local people when practical? [274]

A. What I meant——

Q. (Interrupting.) Wouldn't it have been practical to have hired these local natives up there who had strong backs and weak minds to do the common labor working at Big Mountain?

A. Yes, we did when we had common labor working at Big Mountain when we could use them, but the work we had in June didn't fall under what we call "common labor".

Q. Isn't it the fact that you deferred hiring these local people until the weather began to get cold because they could stand the cold better than white men could? A. No, definitely not.

Q. Isn't that exactly what happened?

A. No, it is not exactly what happened.

(Testimony of Einar W. Erickson.)

Q. Now, you said something about good hands on lake culverts. How much skill does it take to lay a culvert?

A. I will tell you how much skill it takes. I couldn't lay one. I don't know how.

Q. Perhaps you aren't skilled in laying culverts. I assume you are talking about culverts across roadways and so forth.

A. Yes. It takes skill. A culvert, to answer your question, while I don't know how, I know what the specifications say as to how it is to be done. You will find that the culvert must be bedded; that the ditch which is to receive the culvert must be shaped; the material must be compacted; the culvert is put in and it is hand backfilled and [275] tamped; there is a culvert collar which has got to be installed in a certain way. Some culverts come from the factory made up and fully round; other culverts come in sections, which are nested. You have to take a blueprint to put one of them together.

Q. What type of culverts did you install on the road up to Big Mountain?

A. I think that the bulk of the culverts at Big Mountain were made of pipe, although I believe there was some which were nested.

Q. Corrugated pipe? A. Yes.

Q. How big in diameter?

A. From twelve inches in diameter to thirty inches.

(Testimony of Einar W. Erickson.)

Q. Those culverts were for drainage purposes, were they not? A. Yes.

Q. So that you had to have the upper end where the water ran in to the pipe higher than the end where it ran out, didn't you? A. Yes.

Q. And that requires a lot of skill to do that, you say? A. It does.

Q. You were a member of the negotiating committee, were you not, for the AGC-AFL Alaska Territory Agreement? [276] A. I was.

Trial Examiner: 1956?

Mr. Latimer: 1956.

The Witness: I was a member and gave my attendance on a proxy basis, I believe. In 1955 I sat through the negotiations.

Q. (By Mr. Latimer): What agreements did you make with the various unions with whom you negotiated who were parties to the 1956 contract in reference to utilizing their services for personnel of the particular crafts involved?

A. I think the agreement speaks for itself.

Trial Examiner: Will you please answer the question.

The Witness: Yes, sir.

Q. (By Mr. Latimer): Did you have any agreements?

Mr. Morrison: Let's limit it to Exhibit No. 5.

Q. (By Mr. Latimer): Outside of the agreement, did you have any understanding with the various labor organizations or party members to the 1956 contract that you would obtain the crafts-

(Testimony of Einar W. Erickson.)

men from the particular organization, electricians, laborers, and so forth?

A. The only outside meeting that I attended was the meeting that I called in my office. The subject matter of the meeting is reflected in the book.

Q. You had no other agreement?

A. No, sir, we did not have any other agreements. [277]

Trial Examiner: Mr. Erickson, I think you made a mistake. I think you signed this agreement in 1956.

The Witness: This was made in 1955, that is, in the winter of 1955-1956.

Trial Examiner: But this is the 1956 agreement, it not?

The Witness: Yes.

Q. (By Mr. Latimer): You sat in on those negotiations? A. Yes.

Q. What agreement, if any, did you have with Local 341 of the Laborers Union in reference to the number of natives that you may employ at the job site?

A. I didn't have an agreement with Local 341. I told Local 341 about what I was going to do. Local 341 neither consented or dissented.

Q. What did you say you were going to do?

A. I told them I was going to hire local people.

Q. Within what percentage?

A. I told them that I might run as high as twenty-five per cent.

Q. That was agreeable to 341?

(Testimony of Einar W. Erickson.)

A. They made no comment whatsoever.

Q. They didn't complain about it?

A. They moaned a little.

Q. What do you mean by, "they moaned a little"? [278]

A. Well, I think they reflected a desire that perhaps we use more than that. I told them that I was going to use local people when and as the occasion required us to use them.

Q. When you hired local people, did you notify 341 that you hired them?

A. I think in the main we did.

Q. For what purpose did you notify Local 341?

A. So that they would be acquainted with the fact that we had taken them aboard. Their job steward is responsible for not only their own membership on the job, but for anyone else that we put on the job if they are doing laborer's work.

Q. Do you have any occasions when Local 341 ever assigns you a laborer at your request who is not a member of 341?

A. I personally do not.

Q. Is it a fact that you assume that all the people that 341 assigns you are members of Local 341? A. I believe that's correct.

Q. Who was Mr. Wargny's immediate supervisor as Personnel Manager?

A. I believe his chain of command was Mr. King, who was Assistant Project Manager in Charge of Support, and then Mr. Peterson, who was Proj-

(Testimony of Einar W. Erickson.)

ect Manager, and then myself, who was in charge of everything up here.

Q. Tell me about these college students. How are the arrangements made to hire these twenty or twenty-five college [279] students?

Mr. Morrison: I object. There is no reference in the record that any twenty or twenty-five were hired.

Q. (By Mr. Latimer): What arrangements were made to hire college students?

A. Well, every year I get a few letters from various people in the company indicating that they feel that some young man should be given an opportunity to work up here and asking me if I can place them. Every year I get a few letters from Universities inquiring as to whether we can employ some college students, and every year there are a few other odd people here and there who for one reason or another feel that they can impose upon Morrison-Knudsen to help someone out. Our attitude is that we will go as far as we are able to in this direction. I think this year your figure of twenty-five doesn't miss it very far. I think we had around thirty-five total this year. I normally handle all those cases directly myself and I normally make a reply directly to the person who had inquired and say, "Yes, I have a job for you", or "no". I am getting more of them than we can absorb this year. In the case of the four college boys here, I received an inquiry routed up by Mr. Snow in our Seattle office and he had indicated he

(Testimony of Einar W. Erickson.)

had been approached by the University of Washington Athletic Department. They had some of these athletes that they wanted us to take aboard. I notified them [280] we would take some, at least, aboard.

Q. Who is the president of your company?

A. Henry Renfield Morrison.

Q. Isn't it a fact you received a letter from Mr. Morrison to hire these college boys in 1956?

A. I believe I had a letter from Mr. Morrison relative to one or two. By no means did Mr. Morrison have a blanket coverage on all the college boys that we hired.

Q. And isn't it also the fact that when the arrangements were made to hire these college boys that Local 341 was contacted and told that you wanted these college boys cleared for employment with M-K?

A. If that were done, it was not done by me.

Q. Do you know who did do it?

A. I say I don't know that it was done.

Q. You don't know if anybody made those arrangements or not?

A. I do not, no person at all.

Q. Do you recall making the statement that the unions were asked to clear these boys and dispatch them to the jobsite indicated because it was the political thing to do? A. Yes.

Q. That is a correct statement, is it not?

A. Yes, we notified the unions that we were taking aboard people. We don't ask the unions whether

(Testimony of Einar W. Erickson.)

they will allow us [281] to or not. We tell them that we are taking them aboard.

Q. And the union raised no objection?

A. I can't tell you whether they objected; they cleared them.

Q. And sent you dispatch slips for these various college boys to the various jobsites?

A. I think that's right.

May I interrupt to define that particular thing. All these college boys didn't work for the Laborers, you understand.

Trial Examiner: We are talking about the four.

The Witness: The four, all right.

Q. (By Mr. Latimer): Go ahead.

A. Well, he cleared me up.

Q. I believe you testified on direct examination that you depended upon the various labor organizations to furnish you employees with the required skills necessary to do the functions that you had for them to perform, such as driller or whatever he may have been. A. That's right.

Q. Do you know—strike that. Did Local 341, when you sent a request for laborers, ever send you anyone that you didn't want, and you rejected him? A. I think they did.

Q. Do you recall any specific instance?

A. I can tell you this, Mr. Latimer, that when you employ [282] three thousand men and you get dispatches on them, whether it is from 341 or from some other union, once in a while you get a dog out of that barrel and he is no good and you get rid of

(Testimony of Einar W. Erickson.)

him and you would have been better off if they hadn't sent that man to you.

Q. Actually though, isn't it the fact that you relied upon not only Local 341, but the other labor organizations to send you the kind of help you needed? A. Very definitely, sir.

Q. And you depended upon them to do that?

A. That is correct.

Q. If you wanted a wagon driller, you expected them to send you a good wagon driller?

A. That's right.

Q. And so forth on down the line, electrician, plumber, or whatever it might be?

A. That's right.

Q. Did you have any agreement with Local 341 —strike that.

Mr. Latimer: I think that's all.

Trial Examiner: Have you any questions?

Redirect Examination

Q. (By Mr. Morrison): Mr. Erickson——

Mr. Latimer (Interrupting.) Will you excuse me just one moment, please?

Mr. Morrison: Yes. [283]

Mr. Latimer: Will you mark this, please.

(Thereupon the paper above referred to was marked General Counsel's Exhibit No. 12 for identification.)

Mr. Latimer: Mr. Erickson, are you familiar with the——

(Testimony of Einar W. Erickson.)

Mr. Morrison: (Interrupting.) Did you want it identified?

Mr. Latimer: Yes. These are copies of two telegrams. The first one is message number 36-020730 to C. R. Pritchard, Anchorage, from Site Superintendent. The second one is message number 3 to Site Superintendent Site Two, from Personnel Manager, Site Anchorage, 11:45 a.m., 6-2-56. I understand counsel stipulated that these are copies of messages sent.

Trial Examiner: And received?

Mr. Latimer: And received as indicated.

Trial Examiner: On the date indicated?

Mr. Latimer: Yes, sir.

Trial Examiner: When was the first one?

Mr. Latimer: Apparently, Mr. Examiner, it was June 2 at 0730. That was when it was received.

Trial Examiner: They were both sent the same day, is that it?

Mr. Latimer: Yes, sir.

Trial Examiner: One is the message and the other is the answer? [284]

Mr. Latimer: Yes, sir.

Mr. Morrison: We stipulate that these appeared in our files and presumably were sent and received as indicated, although we have no other knowledge of it.

Mr. Latimer: I offer them in evidence, Mr. Examiner.

Trial Examiner: Any objection?

Mr. Morrison: I have no objection.

(Testimony of Einar W. Erickson.)

Trial Examiner: There being no objection, the ppaer is received in evidence, and I will ask the reporter to mark them as General Counsel's Exhibit No. 12.

(The paper heretofore marked General Counsel's Exhibit No. 12 for identification was received in evidence.)

Mr. Latimer: No further questions.

Trial Examiner: Any questions?

Mr. Morrison: Yes, I will continue redirect examination.

Q. (By Mr. Morrison): Mr. Erickson, have you examined General Counsel's Exhibit 12?

A. Yes.

Q. Can you explain the significance of the messages contained on Exhibit 12? A. Yes.

Q. Would you do so?

A. Well, the first message here is from the Site Superintendent, Mr. Pritchard, and he wanted clarification of [285] a policy on local hires. He has pointed out that there a number of persons at Pile Bay and Iliamna that had worked for us and belonged to the union. They wanted to know about using them for a limited time for unloading barges. This thing here in particular is brought about by the fact that they were constantly rotating men from job to job, and, again, as the District Manager here, I had received criticism from the prime contractor, Western Electric, for the way that we had—we would have one batch of men being terminated from a job and about the same time hiring

(Testimony of Einar W. Erickson.)

a second batch of men to transport somewhere. I had put a very firm directive out, I believe it was orally, to the effect that before local hires were taken aboard that they would also make an inquiry into the Central Personnel Agency of Morrison-Knudsen on the CPFF contract to make doubly sure that there were not terminations coming off a job that should be placed at a new job.

Q. And what is meant by the expression "request the men be cleared"?

A. The clearance to make a hire at all, make a new hire.

Q. Who makes that clearance?

A. The clearance was made out of the Personnel Section, who would first determine that there were no available men being released from another site.

Q. That refers to Morrison-Knudsen personnel?

A. The Morrison-Knudsen CPFF Personnel Section. [286]

Q. Now, Mr. Erickson, do you have any knowledge as to whether a man dispatched by the union was or was not in fact a union member?

A. I have no personal knowledge of that, no.

Mr. Morrison: No further questions.

Recross Examination

Q. (By Mr. Latimer): Mr. Erickson, I believe you stated that when the men were hired on the jobsite, you checked in with the union on that, is that correct?

(Testimony of Einar W. Erickson.)

A. I think they notified the unions in some cases that they hired somebody. I don't think it was constantly done. The steward made a point, generally, of finding out.

Q. Who is Mr. Robert F. Peterson?

A. Mr. Robert F. Peterson was the then Project Manager of the White Alice CPFF Contract.

Mr. Latimer: I will ask the reporter to mark for identification General Counsel's Exhibit 13.

(Thereupon the paper above referred to was marked General Counsel's Exhibit No. 13 for identification.)

Q. (By Mr. Latimer): General Counsel's Exhibit No. 13 is a paper on Morrison-Knudsen letterhead, dated May 24, 1956, bulletin 103. I will ask you if you are familiar with that?

A. Yes, I believe I have seen this.

Q. Will you tell me the purpose of that?

A. The purpose of this, again, is an attempt to regulate [287] and coordinate the hiring and terminations of the various sites in this contract, there being some twenty-two sites in all.

Mr. Morrison: Mr. Examiner, may General Counsel's Exhibit No. 13 also be taken for copying?

Trial Examiner: Certainly.

Mr. Latimer: I offer it in evidence, Mr. Examiner.

Mr. Morrison: No objection.

Trial Examiner: There being no objection, the paper is received in evidence, and I will ask the

(Testimony of Einar W. Erickson.)

reporter to kindly mark it as General Counsel's Exhibit No. 13.

(The paper heretofore marked General Counsel's Exhibit No. 13 for identification was received in evidence.)

Q. (By Mr. Latimer): Mr. Erickson, do you know Mr. L. R. Shaw? A. Yes.

Q. Who is he?

A. He is presently our Alaska District Personnel Manager.

Q. Was he your Personnel Manager in November, 1956?

A. He was working for the company. I don't know whether he was still on the CPFF Contract at that date or whether he was over here in the District. He was working for us.

Trial Examiner: In what capacity?

The Witness: Personnel work.

Q. (By Mr. Latimer): Could you identify his signature? [288]

Trial Examiner: What do you mean, was he manager or just——

The Witness: (Interrupting) I believe he was Personnel Manager, either on the CPFF Contract or Personnel Manager here at that date.

Q. (By Mr. Latimer): I show you two letters which have been marked for identification as General Counsel's Exhibits 14 and 14-A dated November 6, 1956, and ask if you can identify Mr. Shaw's signature.

(Testimony of Einar W. Erickson.)

(Thereupon the letters above referred to were marked General Counsel's Exhibits Nos. 14 and 14-A for identification.)

A. No, I don't know his signature.

Mr. Latimer: That's all.

Trial Examiner: If you show it to Mr. Morrison you might be able to ascertain whether that's Mr. Shaw's signature or not.

Mr. Latimer: Will counsel stipulate that that is a letter from Mr. Shaw, the Personnel Manager?

Mr. Morrison: I will stipulate that's Mr. Shaw's signature.

Mr. Latimer: Will you stipulate that the letter of January 31, 1957, signed by Mr. Shaw, and addressed to the NLRB in Seattle, General Counsel's Exhibit 14-A, is also Mr. Shaw's signature?

Mr. Morrison: Yes, I will.

Mr. Latimer: I offer these two letters in evidence. [289]

Mr. Morrison: Objection. They are not material to any issue in this case.

Trial Examiner: May I look at them, please?

(The letters were handed to the Trial Examiner.)

Trial Examiner: What is the purpose of this letter?

Mr. Latimer: I am about to get into that, Mr. Examiner.

Trial Examiner: Go ahead.

Mr. Morrison: I am going to object to the letter

(Testimony of Einar W. Erickson.)

being admitted in evidence or used for any further appearance.

Trial Examiner: I will overrule the objection and receive the papers in evidence and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 14, and General Counsel's Exhibit No. 14-A.

(The letters heretofore marked General Counsel's Exhibits Nos. 14 and 14-A for identification were received in evidence.)

Mr. Morrison: I would like to be heard on that, Mr. Examiner.

Trial Examiner: You may.

Mr. Morrison: If he desires Mr. Shaw's testimony on any issue of this case, Mr. Shaw has been continuously available. He happens to be absent this afternoon as of the first time. I think if he wanted to introduce something of Mr. Shaw's, he should have put it in Mr. Shaw's case. I don't think he should do it when we haven't got Mr. Shaw available.

Trial Examiner: You may proceed, Mr. Latimer.

Q. (By Mr. Latimer): Will you take a look at Bulletin 103 and General Counsel's Exhibit 14 and Exhibit 13, Mr. Erickson, and you will note that Bulletin 103 is dated May 24, 1956. Does Bulletin 103 set forth the policies of Morrison-Knudsen regarding hiring personnel at jobsites?

A. I think it sets forth a direction relative to hiring personnel at the jobsite.

Q. Very well. Now that was on May 24, 1956.

(Testimony of Einar W. Erickson.)

Now, we look at General Counsel's Exhibit 14, which is a letter from Mr. Shaw, dated November 6, 1956. Explain the third paragraph, please.

A. May I read the letter first?

Q. Yes, indeed. Take your time.

Trial Examiner: Read the entire letter and also 14-A.

Mr. Latimer: I think I should mention, Mr. Examiner, the reason for General Counsel's Exhibit 14-A, which is also a letter from Mr. Shaw. It was submitted to show the correction that he desired to make in his letter of November 6th.

Trial Examiner: That's obvious.

Q. (By Mr. Latimer): In light of Bulletin 103, please explain paragraph three of General Counsel's Exhibit 14.

A. Sure, I can do that. The Site Superintendents were instructed not to make any hires whatsoever of field people until such time as they had contacted the Anchorage Personnel Office in order to make a determination of whether there would [291] be transfer hires coming off other jobsites that should first be used to fill the particular job.

Mr. Latimer: That's all.

Trial Examiner: Any questions, Mr. Morrison?

Mr. Morrison: I have no questions.

Trial Examiner: You are excused, Mr. Erickson. Thank you very much.

(Witness excused.)

Trial Examiner: Will you kindly call your next witness, Mr. Morrison.

Mr. Morrison: I would like to call Mr. C. E. King.

C. E. KING

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: Mr. Morrison, Mr. King has been duly sworn and you may examine.

Direct Examination

Q. (By Mr. Morrison): What is your present position?

A. District Manager for Morrison-Knudsen, Alaska District.

Q. Mr. King, what was your position in 1956?

A. Until December of 1956, I was Assistant Project Manager on Contract 1787, White Alice construction contract.

Q. Does that construction project include the work done at Lake Iliamna? A. It did. [292]

Q. Now, Mr. King, in your position as District Office Manager at this time, and your position as Assistant Project Manager until December of 1956, were the records of employment kept by persons subject to your control, instructions, and direction? A. Yes.

Mr. Morrison: I would like to have this marked as Respondent's Exhibit 3.

(Thereupon the document above referred to was marked Respondent's Exhibit No. 3 for identification.)

Q. (By Mr. Morrison): Mr. King, I am hand-

(Testimony of C. E. King.)

ing you what has been designated Respondent's Exhibit 3. Will you state what that is?

A. This is a tabulation which was prepared at my request by the Personnel Office of Contract 1787. It indicates by wages and job classifications the number of persons who worked at Big Mountain in July and August of 1956.

Q. Does this also include persons working at the portage bay and related work, not directly at Big Mountain, but part of the Big Mountain area of construction?

A. That is correct. They were all paid on the same payroll. This would include Pile Bay, Igiugig, Iliamna, and so forth.

Q. I note on line 2, entitled "Sixteen worked, Nine no time, July 1." What is that? [293]

A. That indicates that there were twenty-five laborers who were listed on the payroll, of whom nine did no hours on this particular week. They were presumably laid off and standing by. They had not been formally terminated because it was possible that they would be needed again tomorrow or the next day.

Q. In your category of laborers, does that include general laborers or all the various types of laborers generally described in Exhibit 5?

A. It does not include all the types of persons who fall within the jurisdiction of the laborers union. It would include common laborers and building laborers. However, on the latter line you will see powdermen who fall within the jurisdiction of

(Testimony of C. E. King.)

Local 341, drill machine operator, jackhammer operator, wagon drill operator; drill machine operator, he is not a member of Local 341.

Mr. Morrison: I request that Respondent's Exhibit No. 3 be admitted.

Mr. Latimer: No objection.

Trial Examiner: There being no objection, the papers will be received in evidence, and I will ask the reporter to kindly mark it as Respondent's Exhibit No. 3.

(The document heretofore marked Respondent's Exhibit No. 3 for identification was received in evidence.) [294]

Mr. Morrison: May we go off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Q. (By Mr. Morrison): Mr. King, I am submitting to you what I will request to be marked Respondent's Exhibit No. 4. Would you state what that is?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 4 for identification.)

A. This is a tabulation similar to Exhibit No. 3 except that it covers a different period. It covers May and June of 1956.

Q. So that Exhibit No. 4 and Exhibit No. 3 together cover the period from May 10, 1956 to or through August of 1956?

A. May 20th through August.

(Testimony of C. E. King.)

Q. Was there any substantial employment at Site 2 prior to May 20th?

A. No, there were from six to a dozen men there from around the middle of March up to the point shown on this exhibit where they began to increase. They were a holding force who did very little.

Mr. Morrison: I move that the exhibit be marked Exhibit 4 and admitted.

Mr. Latimer: No objection.

Trial Examiner: There being no objection, the paper [295] is received in evidence, and I will ask the reporter to kindly mark it as Respondent's Exhibit No. 4.

(The document heretofore marked Respondent's Exhibit No. 4 was received in evidence.)

Q. (By Mr. Morrison): Mr. King, I am submitting to you what I will request to be marked as Respondent's Exhibit No. 5. What is that?

(Thereupon the document above referred to was marked Respondent's Exhibit No. 5 for identification.)

A. This is a tabulation which has been prepared from the Personnel records of Contract 1787. It is a listing of all laborers or persons, common and general laborers, building laborers, who were employed at Site No. 2 during the year 1956. It indicates their names, date of hire, date of termination, and their gross earnings during the year 1956.

Q. Now, Mr. King, we indicate the date of initial hire and the date of termination. Does that

(Testimony of C. E. King.)

necessarily mean that they worked continuously throughout that period?

A. No, it does not. They may have been laid off, but not actually terminated.

Q. What is the explanation of that?

A. Well, there is a lot of paper work involved in terminating a man. Why do it if you think you are going to hire him again tomorrow?

Q. From the standpoint of labor requirements, what is the [296] explanation of laying him off and then rehiring him?

A. It is the volume of work, whether you have work for him today and tomorrow you may not. For example, the barge unloading operation, which has been talked about, you don't have a barge every day, you have one once a week.

Q. The amount of work that the man accomplished, can that best be determined by the reference to the total earnings?

A. The dates of hire and termination are not as conclusive. The total earnings do show definitely how much work he got during the season of 1956.

Q. I note an asterisk by some of the names and a note on the upper right-hand corner stated, the note, "field hire". What is the significance of that?

A. That denotes a man who was hired at the jobsite at Iliamna rather than an imported laborer who came from, say, Anchorage.

Q. What is the fact as to whether a person hired at the jobsite would be a local native or a nonresident of the area?

(Testimony of C. E. King.)

A. Well, in all likelihood he is a local native, or he could be a white man, but he is a local resident. There might be an exception. Somebody might drift by, but it is quite unlikely.

Q. What is the fact as to the availability of the local residents for construction during the summer?

Mr. Latimer: Will you read that question, please.

Trial Examiner: Will the reporter kindly read the question for Mr. Latimer?

(The question was read.)

Mr. Latimer: I am going to object to that until he lays a foundations for it.

Trial Examiner: Overruled.

A. Are you speaking of Big Mountain?

Q. (By Mr. Morrison): Yes, I have reference to Big Mountain.

A. There are a number of Indians and a few white people who reside around the lake at Iliamna and if they aren't fishing, or otherwise engaged, they are available for employment in construction.

Q. When you refer to fishing, what type of fishing do you refer to?

A. Commercial fishing, which is the normal occupation, the bread and butter, of these people.

Q. And how much of the season does that take, if you know?

A. Oh, generally about a month, sometime along in July or generally in the month of July, thereabouts.

Trial Examiner: Regarding this Exhibit No. 5

(Testimony of C. E. King.)

for identification, these refer to people who are hired on Site 2?

The Witness: Site 2 only.

Mr. Morrison: I move that Exhibit 5 be admitted.

Mr. Latimer: No objection.

Trial Examiner: There being no objection, I will ask [298] the reporter to kindly mark it as Respondent's Exhibit No. 5.

(The document heretofore marked Respondent's Exhibit No. 5 for identification was received in evidence.)

Q. (By Mr. Morrison): Do I understand that the persons whose name does not have an asterisk before it were imported or hired outside of Site 2 area and sent to the site for work?

A. That's correct.

Q. Incidentally, Mr. King, are you familiar with an employee of Morrison-Knudsen at Site 2 by the name of Denham?

A. No, there was nobody by the name of Denham in Site 2.

Q. Was there in 1956?

A. There was a man named Dunham.

Trial Examiner: What was his position in the spring and summer of 1956?

The Witness: In the winter of 1955-1956 he was watchman on the premises and in March of 1956 he resumed his normal occupation, which was motor patrol operator.

(Testimony of C. E. King.)

Q. (By Mr. Morrison) Was he a motor patrol operator throughout the year, do you know?

A. As long as he worked there, which was about April, I believe, he was terminated. Possibly around the first of May.

Q. Mr. King, what was the practice, if you know, insofar as taking work applications?

A. At the Site 2 location, I believe that if a person [299] appeared at the office and wanted to take the time to fill out an application, the clerk gave them a blank and helped them fill it out and stuck it in a file.

Q. Were men called to work based on the time of making out these applications?

A. I imagine the applications were filed and forgotten.

Mr. Latimer: I object to this.

Trial Examiner: Tell us what you know.

Q. (By Mr. Morrison): If you know.

A. I was not present at Site 2.

Q. You don't know the practice? A. No.

Q. Well, Mr. King, did you recognize Mr. Wyman, who testified this morning?

A. No, I didn't until he was identified.

Q. But after he was identified, do you recall ever talking to him? A. Yes.

Q. And do you recall the scope of your conversation with him, or the circumstances?

A. Yes, he came in to my office, which was then at the Pomeroy Building in town here. He came in and said he was one of the football players and

(Testimony of C. E. King.)

that Mr. Noel had spoken to me about him. I said, "Fine, you have a job here." I said, "How's the football team?", and he said either great or it is lousy, [300] whatever he said, and then I either told him to go downstairs, or I may have gone downstairs with him, I don't recall exactly, to the Personnel Office, and turned him over to either Mr. Wargny or Mr. Brady, and said, "Here's your man. Put him to work."

Q. That was the extent of your conversation with Mr. Wyman? Did you do anything else in connection with Mr. Wyman's employment?

A. No.

Mr. Morrison: I have no further questions.

Cross Examination

Q. (By Mr. Latimer): Did you call the union in Mr. Wyman's behalf? A. No.

Q. Who called the union, do you know?

A. I don't know.

Q. Will you refer to Respondent's, M-K's, Exhibit No. 3 and explain to me line two, the heading is "laborers", July 1, sixteen worked, nine no time. What does that mean?

A. That means there were nine names on the payroll who had not been terminated but were laid off.

Q. Where it says one worked, eighteen no time, does that mean eighteen standing by?

A. That's right.

(Testimony of C. E. King.)

Trial Examiner: Did Wyman work up at Big Mountain? [301]

The Witness: No, at Aniak.

Trial Examiner: Then it is an error that you have his name on Exhibit No. 5, isn't it?

Mr. Latimer: He transferred to Big Mountain, did he not, Mr. King?

The Witness: Evidently, if he is listed here. There was a great deal of transferring of workers back and forth between sites and apparently he did work at Big Mountain in addition to having worked at Aniak.

Mr. Latimer: That's my understanding, Mr. Examiner. He transferred from Aniak to Big Mountain.

Q. (By Mr. Latimer): Mr. King, the names listed on Respondent's Exhibit No. 5, will you take a look at that, please? I understand that the ones with the asterisk denote field hires.

A. That's correct.

Q. Isn't it the fact that Joseph Churchill was not a field hire?

A. Joseph Churchill is a man that I don't know.

Q. May I refresh your memory. Is he the Joseph Churchill who came up and went to work for M-K as a transit man and later transferred over to a laborer? A. I don't know.

Q. Then you don't know whether he was a field hire or not, do you? [302]

A. No, I don't. I did not make this exhibit. It was made from Personnel records.

(Testimony of C. E. King.)

Q. Was it also the fact that all the names that appear on this exhibit who do not have an asterisk in front of their name were dispatched from Local 341?

A. That they were not field hires. Whether they were dispatched from 341 or not, I do not know.

Q. Do you think the majority of them were dispatched from 341?

Mr. Morrison: I object to the form of that question.

Trial Examiner: I will sustain the objection.

Q. (By Mr. Latimer): Do you know how many were dispatched from 341? A. No.

Q. Do you know how many were not dispatched?

A. No.

Mr. Latimer: Any questions?

Mr. Morrison: No.

Trial Examiner: You are excused.

(Witness excused.)

Mr. Morrison: The respondent rests its case.

Trial Examiner: Have you got any rebuttal witnesses you wish to call?

Mr. Latimer: General counsel rests.

Trial Examiner: Mr. Morrison, have you any other [303] witnesses you wish to call?

Mr. Morrison: I have none.

Trial Examiner: Have you any other testimony you wish to introduce or any other evidence you wish to introduce?

Mr. Morrison: We rest, Mr. Examiner.

Trial Examiner: What about oral argument or

about briefs? Do you wish to argue orally or do you wish to file a brief?

Mr. Morrison: I think the respondent, Morrison-Knudsen, would like to file a brief because of the legal issues involved and the assistance that might obtain from citation.

Trial Examiner: Very well, sir.

How long do you want?

Mr. Morrison: I think twenty days is your maximum period and I will initially ask for the full twenty days, with the understanding that if further time is needed, it must be requested and approved by the Chief Examiner.

Trial Examiner: I can only give you twenty days, and if you can convince Mr. Wallace E. Royster, who is the Associate Chief Trial Examiner, whose address is Room 206, United States Appraisers Building, 630 Sansome Street, San Francisco 11, California, that you need more time, you must make the application at least three days prior to the date I will now fix for the submission of briefs. I will allow you the full twenty days to file a brief, which is [304] October 7. All briefs are to be filed with me on or before October 7 and copies thereof must be filed, must be served upon the parties to this proceeding, and the proof of service must accompany the original.

Mr. Morrison: Do I understand Local 341 is no longer a party to the proceeding for that purpose?

Trial Examiner: But Mr. Moore is a party to the proceeding. I just want to call your attention to that fact.

My address is the same as Mr. Royster's, which I have just given above.

Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

I would like to state for the record that all exhibits which are not offered in duplicate, the duplicates thereof are hereby waived.

Mr. Latimer: I would like to move that the complaint conform to the proof, which takes care of spelling, typographical errors, things of that sort.

Mr. Morrison: I object to any conformity of the complaint as to any proof other than to specify——

Trial Examiner (interruping): The minor details.

Mr. Latimer: One of the things I have in mind, Mr. Examiner, in the complaint, the name Harry Vance appeared. It should be Henry Vance. [305]

Mr. Morrison: I have no objection to any such corrections.

Trial Examiner: I will hereby grant Mr. Latimer's motion in this respect and limit it to this, just to correct minor details, such as corrections of misspelled words, the correction of dates which are not material, which do not materially affect the issues, but the motion will not and does not cover any new unfair labor practices.

Mr. Latimer: That's correct, and it was not so intended.

Trial Examiner: And I assume you make a similar motion with respect to your answer?

Mr. Morrison: Yes, insofar as details are concerned.

Trial Examiner: And that motion is granted with the same stipulations.

Any other motions you wish to make at this time?

Mr. Latimer: No, sir.

Trial Examiner: You, Mr. Morrison?

Mr. Morrison: No, Mr. Examiner.

Mr. Latimer: Of course, I want to again put forth my exception to the dismissal of the complaint.

Trial Examiner: I will hereby declare the hearing closed.

(Whereupon, at 3:00 o'clock, p.m., Friday, September 13, the hearing in the above-entitled matter was closed.) [306]

Room 407, United States Courthouse, Seattle, Washington, Thursday, October 31, 1957.

* * * * *

Proceedings

Trial Examiner: Gentlemen, are you ready to proceed?

Mr. Latimer: Yes, sir.

Mr. Morrison: Respondent ready Mr. Examiner.

Trial Examiner: I suggest you proceed with the offer of papers with respect to the reopening of the hearing.

Mr. Latimer: Mr. Examiner, I have here a motion from respondent, Morrison-Knudsen Company, filed by its attorneys to reopen the record, which

has been marked for identification as General Counsel's Exhibit 15.

(Thereupon the document above referred to was marked General Counsel's Exhibit 15 for identification.)

Mr. Latimer: I have also a response to motion to reopen case and take depositions, filed by counsel for the General Counsel, which the reporter has marked for identification as General Counsel Exhibit 15-A.

(Thereupon the document above referred to was marked General Counsel's Exhibit 15-A for identification.)

Mr. Latimer: I have a telegram from the Trial Examiner granting respondent's motion to reopen and setting forth that hearing will be resumed at Room 407, United States Courthouse on October 31 at 9:30 a.m., which the reporter has marked for identification as General Counsel's Exhibit 15-B.

(Thereupon the document above [309] referred to was marked General Counsel's Exhibit No. 15-B for identification.)

Mr. Latimer: I offer the papers in evidence.

Trial Examiner: Any objection?

Mr. Morrison: No objection.

Trial Examiner: There being no objection the papers are received in evidence and I will ask the reporter to mark them as General Counsel's Exhibit Nos. 15, 15-A and 15-B respectively.

(The documents heretofore marked General Counsel's Exhibit Nos. 15, 15-A and 15-B for identification were received in evidence.)

Mr. Latimer: They are filed in duplicate Mr. Examiner.

Trial Examiner: Are you ready to proceed, Mr. Morrison?

Mr. Morrison: I am ready, Mr. Examiner.

Trial Examiner: Call your witness, please.

Mr. Morrison: Call Mr. Harold Haugen.

Trial Examiner: Will you kindly step forward and be sworn.

HAROLD M. HAUGEN

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Harold M. Haugen.

Trial Examiner: Will you kindly spell your last name for the reporter?

The Witness: H-a-u-g-e-n.

Trial Examiner: Where do you live? [310]

The Witness: At the present time in Boise, Idaho.

Direct Examination

Q. (By Mr. Morrison): Mr. Haugen, what is your present position?

A. Temporarily I am assigned to the Internal Audit Section.

Q. By whom are you employed?

A. By Morrison-Knudsen Company.

Q. How long have you been employed by that company? A. I am in my fifteenth year.

Q. What is your age, Mr. Haugen?

(Testimony of Harold M. Haugen.)

A. Fifty-nine.

Q. And what is the scope of your work in the Internal Audit Section?

A. Assisting with field audits.

Q. Mr. Haugen, were you on or about the month of June 1956 employed by Morrison-Knudsen in the Territory of Alaska? A. I was.

Q. Where were you employed at that time?

A. In the Alaska district office.

Q. What was your position in that office?

A. District office manager.

Q. What are the scope of the duties as Alaska district office manager?

A. General administrative duties.

Q. Did the Alaska district office have control over all operations of Morrison-Knudsen in Alaska at that time? [311]

A. Not—the district office?

Q. Yes.

A. Insofar as district personnel was concerned, no, with the exception of Mr. Erickson, the district manager. We had a fee contract with Western Electric Company at the time which was more or less——

Q. (Interrupting) That contract is the so-called White Alice, that was contract 1787?

A. That is correct.

Q. That was completely separate, do I understand from the——

A. (Interrupting) That was a fee job and a separate entity and apart from the Alaska district.

(Testimony of Harold M. Haugen.)

Q. What over the 15 years of your experience and employment by Morrison-Knudsen, what generally have been your duties?

A. Pretty much on the order of what they were at that time. Field office manager's duties encompass about the same responsibilities except on a one project or two project basis rather than covering a district.

Mr. Latimer: Are you going to elaborate on that, he hasn't told us anything yet. I will object to the question, Mr. Examiner, on the ground it hasn't been answered .

Trial Examiner: Overruled.

Q. (By Mr. Morrison): Mr. Haugen, drawing your attention to a time on or about June 10, 1956, do you recall at that time meeting and interviewing three students from the United States [312] who had come to Alaska for employment?

A. I do.

Q. Would you explain the circumstances of your meeting at that time?

A. Well, I had been advised by Mr. Erickson that he had made a commitment to employ five college students, I believe they were, who were either football or basketball players, had committed them for jobs in Alaska on one or more of our projects.

Q. I see. And under what circumstances did you meet the boys?

A. When they came to our district office in our yard there at Anchorage.

(Testimony of Harold M. Haugen.)

Q. And how did you happen to see them at that time?

A. Well, I believe that they first asked for Mr. Erickson and Mr. Erickson was not in the office at the time and they were ushered into my office by Mr. Erickson's secretary, I believe.

Q. Do you recall your conversation with them at that time? A. Well, not precisely.

Trial Examiner: How many of the five came in to see you on that occasion?

The Witness: It's my recollection that there were three or it could have been four, but not more than that. I am not entirely sure whether it was three or four. However, Mr. Erickson told me about five boys he had promised employment for.

Q. (By Mr. Morrison): Do you recall the substance of your conversation with them at that time?

A. I recall visiting with the boys for some few minutes, and I also inquired of each of them if they had had any experience as rod men, because we had two openings at the time for rod men out of our district office.

Q. What is a rod man?

A. A rod man, his principal duty is to hold a surveying rod for the transit men in making engineering surveys.

Q. In relation to employing these boys, do you recall anything further you discussed with them?

A. No, I told them that we had been expecting them, that we were advised by Mr. Erickson that they would be arriving in Anchorage about that

(Testimony of Harold M. Haugen.)

time and that they were to be employed on one of our projects.

Q. Now, did you discuss with them during this conversation in any manner the question of union relationships? A. No, I didn't.

Q. Did you say anything about the union to them at that time?

A. I have no recollection of saying anything to them about a union or unions, except to the extent that I told them that I would like to have them check through the laborer's local since they were going out on one of the projects as a laborer.

Q. What was the purpose of checking through the laborer's local?

A. That was simply a practice that had been going on for some time. Principally, I suppose so that the unions would know who was employed on our projects, how many union and how many non-union. [314]

Q. After you talked to the boys what did you do in connection with their employment?

A. I had previously told Harold Groothius, of the laborers local, that these boys would be arriving soon and that they had been promised employment and would be going out to one or more of our projects as laborers.

Q. What did you do, if anything, at the time of this conversation?

A. I called Mr. Groothius and told him that the boys were in my office and would be dispatched to the job, either that day or the following day.

(Testimony of Harold M. Haugen.)

Q. And what job—are you aware of the job to which they were dispatched?

A. At the time we were not employing but a very few men. 1956 happened to be a season when the work on most of our lump sum projects was late in getting started because of the time that the snow stayed on and so I called Mr. Wargny and told him that we had these boys and would like to have them placed. Well, apparently Mr. Erickson had mentioned it to Mr. Wargny too because he seemed to be acquainted with the fact that these boys had been promised employment and were to be sent out to the job.

Q. What was done with the boys after that, so far as you know?

A. When I called Harold Groothius of the laborers, to tell him these boys were in, he said he would like to see them but [315] he didn't want them to come up to the hall. This was in the morning. He said the hall was full of men and that he would like to come down to our yard and see them.

Q. What did M-K do with the boys at the time they were in your office?

A. When Harold Groothius came down to our office I walked out into the yard with the boys, introduced them to him and he went across the yard into another building, across the yard from our district office with them. That, I believe, was the last time I saw them.

Q. Were they sent over to contact 1787 office?

(Testimony of Harold M. Haugen.)

A. I believe that Mr. Groothius drove them over there.

Q. And you have no personal knowledge of that? A. No, I do not.

Q. Mr. Haugen, did you say anything to them in any manner indicating that they had to join the union?

Mr. Latimer: Just a moment. I object to counsel leading the witness. Let him tell us what the conversation was.

Trial Examiner: Will you propound your question?

Mr. Morrison: I asked the witness if he said anything to any of the boys at the time of the conversation, in any manner, advising them that they had to join the union.

Mr. Latimer: He is putting the answer in the witness' mouth. I object to that. I would like to know exactly what happened. I certainly object to counsel asking a question. [316]

Trial Examiner: Do you remember anything else that was said by you or the boys on that occasion?

The Witness: Not specifically, sir. I would like to state, however, that neither myself or anyone else in our district office, I am sure at that time or anytime before or since during the time that I was in the Alaska District Office, was there a man ever told that he could not have employment unless he was a member of a union.

Trial Examiner: I will overrule the objection.

(Testimony of Harold M. Haugen.)

Q. (By Mr. Morrison): Why are you sure that that would not have been said, Mr. Haugen?

A. Well, we were all very well acquainted with the fact that it would be a direct violation in the first place, of one of the provisions of the Taft-Hartley Act and had I ever said something like that to anyone I am sure Mr. Erickson would have thrown me out of the office bodily. It just wasn't ever mentioned by anyone.

Q. Now Mr. Haugen, if an employee who had been promised a job refused to join the union——

Mr. Latimer (interrupting): Just a moment.

Trial Examiner: I can't rule on a question until he propounds it.

Mr. Latimer: I object to the question.

Trial Examiner: He hasn't even finished his question.

Would you pose your question, please. [317]

Mr. Morrison: I was asking Mr. Haugen, if a potential employee who refused to join the union would have been refused employment by reason of his refusal to join the union.

Trial Examiner: Do you object to that question?

Mr. Latimer: I do.

Trial Examiner: I will sustain the objection.

Mr. Morrison: I have no further questions.

Trial Examiner: Any questions, Mr. Latimer?

Mr. Latimer: Just one or two.

Cross Examination

Q. (By Mr. Latimer): Mr. Haugen, you just

(Testimony of Harold M. Haugen.)

told us that if you were aware of the fact if any mention was made or something or other, about speaking to potential employees about the union, would be in violation of the Taft-Hartley Act. Would you elaborate on that and explain to us just what you had in mind?

A. Well, we, I believe we are all aware of the fact that there had been employers who had been in difficulties with the National Labor Relations Board over similar matters. We stressed to all our people that the matter of belonging to the union was not a condition of employment under any circumstances.

Q. Isn't it a fact that during the period of time that we are speaking about, that is in the early summer of 1956, that Morrison-Knudsen obtained all of their laborers from the union hall in Anchorage?

A. No, sir. [318]

Q. All that they were going to send out to all of the White Alice projects?

A. As far as White Alice is concerned I can't tell you too much about that sir.

Q. Can you tell me the name of any laborer that was employed by Morrison-Knudsen during that period that wasn't from Anchorage to one of the White Alice projects that was not obtained from the local laborers union hall?

A. There, sir, I have no information or no knowledge as to what went on at White Alice. They were in separate offices.

Q. Isn't it a fact that you had nothing to do with the White Alice projects?

(Testimony of Harold M. Haugen.)

A. That's correct.

Q. You were working on a separate contract, were you not?

A. On all lump sum contracts.

Q. Which was different from the White Alice Contract? A. That is correct, sir.

Q. Actually you had nothing at all to do with the employees obtained by Morrison-Knudsen for work on the White Alice projects, isn't that a fact?

A. That is correct.

Q. Let me ask you this, your office was the same building as the office of the White Alice projects?

A. No, sir.

Q. Where was your office located? [319]

A. In the railroad yards, in the Alaska Railroad Yards, which was commonly known as the terminal yards. That was on Shipscreek Road.

Q. Where was the White Alice office located?

A. That was on the Post Road, in the Pomerory Building which had been the headquarters of the Pomerory Construction Company.

Q. That is some mile or two miles away is it not?

A. I would say three-quarters of a mile or so.

Q. That is across the railroad track and north of your office?

A. That's approximately correct, I believe, as to direction.

Q. Where was Mr. Erickson's office located?

A. In the district office.

Q. In the same office you are in?

(Testimony of Harold M. Haugen.)

A. Yes, sir.

Q. Why did you call Harold Groothius at the union hall when these college boys appeared up there?

A. That was just the practice we had followed for quite a long time.

Q. Well, let me see if I understand you.

Trial Examiner: You mean it was your practice to call the union hall before you hire anybody?

The Witness: No, sir. Before we dispatched a person to a job, simply to advise them that such and such a person was being employed and going to such and such a project.

Trial Examiner: Before sending anybody out on a job, you [320] did what, with respect to the Laborers Union?

The Witness: Just simply called them and told them that we were going to employ these people to go out to a project site, employed as laborers.

Trial Examiner: And?

The Witness: And it was up to them to take it from there.

Trial Examiner: Up to who?

The Witness: To the Laborers Local.

Trial Examiner: Would you send any laborer out on a project unless he received a dispatch slip from the Laborers Union?

The Witness: I don't know, sir, that they received a dispatch slip from the union.

Trial Examiner: You just called them up and

(Testimony of Harold M. Haugen.)

gave the union the man's name and that was the end of it?

The Witness: Usually the man checked with the union; as to whether or not they were always given dispatch slips or any—they were given some sort of identification, I would imagine.

Trial Examiner: Would you call the union in front of the man you were about to hire or did hire?

The Witness: I don't recall whether they were present or not, in this particular instance.

Trial Examiner: You mean the three college boys?

The Witness: That's right.

Q. (By Mr. Latimer): Mr. Haugen, it's a fact, is it not, that Morrison-Knudsen obtained practically all of the laborers they [321] sent out from Anchorage, through the Local Laborers Union Hall?

A. I would say in most instances, yes, sir.

Q. The reason is they did that because they could depend on the union to send them the men they wanted in all the skills they needed at that time?

A. We usually got very good men through the union, yes.

Q. That's the only place you got them, wasn't it?

A. Not necessarily, we had a great many local hirers on some of our lump sum contracts.

Q. I am talking about the White Alice projects.

A. I don't know anything about that, sir.

(Testimony of Harold M. Haugen.)

Q. All right. Is this the only instance you recall of when you personally called the union hall when potential employees would apply at the office for employment?

A. That particular summer, I believe, yes.

Q. As a matter of fact it wasn't your business to do that, was it Mr. Haugen?

A. Not insofar as White Alice is concerned. It's a general thing.

Q. Was that Mr. Wargny's job?

A. That's right.

Q. However, Mr. Erickson did tell you that arrangements had been made to employ five college boys? A. That's right, sir.

Q. When they got up there they talked to you?

A. That's correct.

Q. As soon as they arrived you called the union hall and got ahold of Harold Groothius and told them the boys were there? A. Yes, sir.

Q. And Harold came down and signed them up in the union? A. That I am not aware of.

Q. Why do you think Harold came down to see them?

A. Well, I believe in most instances they always saw those men that we checked through the union before they were dispatched.

Q. Isn't it obvious that the reason they saw them was that he signed them up in the union?

A. I think that is reasonable to expect. That would be one of the chief objectives or interests.

Q. Isn't it also the fact that every laborer that

(Testimony of Harold M. Haugen.)

was hired in Anchorage before he was sent out to the job site, was required to check in the union hall and get a dispatch slip?

A. Well, ordinarily when we wanted any of the help for any of the projects.

Trial Examiner: He is talking about people coming into the office and applying for a job.

Is that what you are talking about, Mr. Latimer?

Mr. Latimer: Yes, sir.

A. Well, that has rarely happened in Anchorage.

Q. (By Mr. Latimer): What do you mean, rarely happened?

A. It was a very rare occasion when anyone in Anchorage came [323] to our office and applied for employment.

Q. When they did do that what did you do, didn't you send them to the union hall to get clearance before you dispatched them, wasn't that the practice?

A. In most cases, I would say, yes.

Q. Do you know of any case when that did not happen?

A. I believe I do, yes, sir. Why it was an old employee and might have been requested by one of the foreman or superintendents.

Q. What did you do on that occasion?

A. Well, I am sure there was, there were cases of that kind where the man was simply shipped out to the job and the union was advised, the same as in all cases that he was dispatched in.

(Testimony of Harold M. Haugen.)

Q. In those cases the employee you dispatched was already a member of the union was he not?

A. Well, that wasn't involved as far as we were concerned.

Q. Do you know of any cases where the employees shipped out under those circumstances were not members of the union?

A. No, I do not. In fact I believe there are very few construction laborers or any other classification in Alaska who are not union members. They find, I'm sure, to their advantage to belong to the union.

Mr. Latimer: I think that is all.

Mr. Morrison: I have no further questions.

Trial Examiner: You are excused sir, thank you very kindly. [324]

(Witness excused.)

Trial Examiner: I presume that you have no other witnesses.

Mr. Morrison: I have no other witnesses.

Trial Examiner: Do you have any other evidence that you wish to introduce?

Mr. Morrison: No, Mr. Examiner, and the employer does rest.

Mr. Latimer: May we go off the record?

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. Latimer, have you any other witnesses you wish to put on?

Mr. Latimer: Nothing further, Mr. Examiner.

Trial Examiner: Is there anything else you wish to take up with me gentlemen, before I declare the hearing closed?

Mr. Morrison: No, I have nothing more, Mr. Examiner.

Trial Examiner: Very well, the hearing is hereby closed.

(Whereupon, at 10:35 a.m., Thursday, October 31, 1957, the hearing in the above-entitled matter was closed.) [325]

GENERAL COUNSEL'S EXHIBIT No. 2

DISPATCH SLIP

Hod Carriers and Construction Laborers' Union
Local No. 341 Dial 34575 926 5T Ave., Anchorage

Date 6-11-56

Name: Ronald Crowe
As Laborer To M-K
Job Location: Romanzoff
Min. Wage 3.48 On shift.....
Dispatcher: /s/ H. F. Groothuis

GENERAL COUNSEL'S EXHIBIT No. 3

(Copy) [Telegram]

May 17, 1956

Messrs. Jim and Ben Aldrich
1628 Southeast Sixth Avenue
Camas, Washington

Positions For Heavy Equipment Mechanics Available In Near Future. Advise Collect Wire If

General Counsel's Exhibit No. 3—(Continued)
Members Of A Local And If Clearance Will Be Granted For Alaska. Advise Also If In A Position To Furnish Your Own Transportation To Anchorage With Assurance That Positions Available And Union Clearance Granted Upon Your Arrival. Full Set Of Light And Heavy Mechanics Tools Required On This Project.

R. A. Wargny, Sr. Personnel Manager
Morrison-Knudsen Company, Inc.
Contract 1787
Pouch 7, Anchorage, Alaska.

GENERAL COUNSEL'S EXHIBIT No. 3-A

(Copy) [Telegram]
ACS 33
AS 74
AN SEA 336 23 Collect Camas Wash 24 845 AMP
M R A Wargny Personnel Mgr.
Morrison Knudson Co. Contract 1787 ANC
Have Had Call From Seattle Office They Are Checking Union Clearances And Will Call Us Back To Report. They Will Notify You.
Jim and Ben Aldridge.

(31) . . .

GENERAL COUNSEL'S EXHIBIT No. 3-B

DISPATCH SLIP

International Union of Operating Engineers
Local No. 302

Eliot 2424 Time .....
Name: James D. Aldridge Date: 6/7/56
As: H. D. Mech. To: M K
Job Location: Anchorage (White Alice job)
Min. Wage 4.06 On Shift: v
Dispatcher: E. Winkler

DISPATCH SLIP

* * * * *

Name: Ben R. Aldridge Date: 6/7/56
As: H. D. Mech. To: M K
Job Location: Anchorage—White Alice job
Min. Wage 4.06 On Shift v
Dispatcher E. Winkler

GENERAL COUNSEL'S EXHIBIT No. 3-C

[Telegram]

Seattle Washington June 6 11:00 AM
R. A. Wargny

John E. Bradbury and Mack Williams Structural Ironworkers Left Spokane For Alaska A Week Ago Driving Should Be There Now. Joseph S. Churchill Transitman Department Seattle PNA Flight 5 June 7. Jim & Ben Aldrich Heavy Duty Mechanics Departing Seattle PNA Flight 403 At 12:05 AM June 8 As Scheduled. Buford Stalker Chief Of Party Not Available. Kissinger

In The United States Court of Appeals for the Ninth Circuit

Nos. 16383, 16401

MORRISON-KNUDSEN COMPANY, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

INTERNATIONAL HOD CARRIERS', BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL 341, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition to Review and Set Aside and on Request to Enforce on Order of the National Labor Relations Board

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BRIEF FOR PETITIONER

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AUTHORITIES CITED

Cases:

In The United States Court of Appeals for the Ninth Circuit

Nos. 16383, 16401

MORRISON-KNUDSEN COMPANY, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

INTERNATIONAL HOD CARRIERS', BUILDING AND COMMON LABORERS' UNION OF AMERICA, LOCAL 341, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition to Review and Set Aside and on Request to Enforce an Order of the National Labor Relations Board

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BRIEF FOR PETITIONER

Jurisdictional Statement

This case is before the Court on the Petition of Local 341, International Hod Carriers', Building and Common Laborers' Union of America, Local 341, AFL-CIO, to review and set aside an order of the National Labor Relations Board issued against petitioner and Morrison-Knudsen Company, Inc., issued on January 29, 1959, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 USC 151 et seq.). In its answer the Board requested enforcement of its order against petitioners. The jurisdiction of this Court is based on Section 10(f) of the Act. The Board's decision and order are reported at 122 NLRB 136.

STATEMENT OF THE CASE

Morrison-Knudsen, Inc., hereinafter called the Company, is an Idaho corporation engaged in the construction business in the State of Idaho and in the State of Alaska.

International Hod Carriers', Building and Common Laborers' Union of America, Local 341, AFL-CIO, hereinafter called the Union, is a labor organization, representing building laborers, hod carriers, tunnel miners, jackhammer operators, wagon-drill men, blasters, powdermen and common laborers, among others, in Alaska.

During the 1956 construction season, the Company was engaged in building intricate facilities at such remote, virtually uninhabited areas as Bethel, Akiak, Galena, Newenham, King Salmon, Anchorage, Fairbanks, Big Mountain, Point Romanzoff and other sites in the State of Alaska (R. 334), for an urgent National Defense system to defend the West Coast from thermonuclear attack. The Company employed more than two thousand employees on all of the projects (R. 329-330), and the hiring of such personnel was performed both at the various job sites and at the Company's main office in Anchorage, Alaska (R. 121, 347).

On October 9, 1956, an individual, Denton Moore, filed a charge alleging in part that "the Company . . . on or about March 15 promised the undersigned and Henry Olympic, Simeon Zacker, Fred Olympic, and others from Kokhanok Bay and Iliamna (and various other local communities) jobs at the White Alice Job Site 2, and on or about June 1, refused to hire us because we were not members of the Construction and General Laborers' Union, Local 341, in keeping with an illegal arrangement with said labor organization, all in violation of Sections 8 (a) (1) (3) of the Labor Management Relations Act of 1947" (R. 5-6).

A second charge was also filed on October 9, 1956, by Denton Moore, and alleged in part, "the above named labor organization, through its officers and agents, by an illegal

arrangement, have caused the Morrison-Knudsen Company at its White Alice Job Site 2 to refuse to hire the undersigned and Chester Wilson of Iliamna, Alaska, Henry Olympic, Simeon Zacker, and William Rickteroff of Kokhanok Bay, Alaska, and various other men from local communities, on or about the first of June, 1956, because we were not members of the above named Union" (R. 3-4).

On or about August 3, 1957, a consolidated complaint was issued, alleging that,

1. during the six-month period immediately preceding the filing of the charges, the Company and the Union had an unwritten agreement, arrangement, or practice, whereby (a) applicants for jobs as construction laborers were obligated to be cleared by the Union as a condition of hire, (b) the Union was obligated at times to procure employment with the Company for its members in preference to non-members, and (c) the Company, during the 1956 construction season, used the facilities and dispatching personnel of the Union to determine the qualifications of applicants seeking jobs as construction laborers with it;

2. during the aforesaid six-month period, and thereafter, the Company and the Union had a written agreement which permitted the Union to discipline its members in the employ of the Company without limitation;[1]

3. the Union, while functioning as hiring agent for the Company did, on or about June 11, 1956, require eight named applicants for jobs with the Company to seek membership in the Union as a condition of hire and dispatch to the Company's job sites; and

4. under the aforesaid agreements, arrangements or prac-

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[1] The Trial Examiner recommended, and the Board adopted such recommendation, that the allegations that the Company permitted the Union unlimited authority to discipline its members in the Company's employ be dismissed for lack of substantial evidence (R. 29, 81).

tices, the Company refused to treat as eligible for employment as construction laborers at its Big Mountain construction site, any local applicants at Big Mountain until such time as the Union had given preference to its members and to others then accepted as members, who desired dispatch for such employment, and thereby deferring until mid-August the employment of 26 named local applicants.[2]

The evidence adduced at the hearing was concerned primarily with the circumstances surrounding the summer employment of five non-resident college students and the employment of local residents at the Big Mountain construction site. The five students, Maris A. Abolins, Ronald S. Crowe, Joel I. Garnes, Robert Bleek and William Wyman were University of Washington athletes who had been hired for summer employment in Alaska by the Company as a result of requests made to Company by the University Athletic Department with respect to the first four and by a Mr. Everett Noel of the Alaska Freight Lines with respect to Wyman (R. 307, 330).

On June 10, 1956, the first four above-named athletes arrived in Anchorage, Alaska, and reported to the offices of the Company. They were told by Mr. Haugen, a Company official, that they were expected and that they would go through the Union hall and be dispatched to the job site. Mr. Haugen then contacted Harold Groothuis, Business Representative for the petitioning Union, who came over to the Company's office. The five individuals then went into a vacant office where they had a discussion and were given applications for joining the Union (R. 174). Thereafter, they were taken over to the Union Hall by an employee of the Company and received a dispatch slip from

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[2] The Board found "insufficient basis in the record for holding that the hiring of these 26 was delayed because of their lack of membership in the Union, rather than for the economic reasons testified to by the Company." (R 83)

Mr. Groothuis. All four of the individuals were then dispatched to various job sites of the Company.

The fifth student, William Wyman, arrived in Anchorage on the 13th day of June, 1956. Upon his arrival in Anchorage, he contacted the Company and talked to a Mr. King, who told him that he would be going out the following day, and that he would need a dispatch slip from the local union. Wyman then went to the Union hall and talked to Mr. Groothuis, who took his application for membership in the Union. Wyman was never told that he had to join the Union, and according to his testimony, he was aware of the fact that he did not have to join the Union as a condition of employment (R. 313); he further testified that neither Mr. Groothuis nor anyone else ever told him that he had to join the Union (R. 315), and that he "came to Alaska with the idea that [he] would join the Union" (R. 313).

With respect to the employment of local residents at the Big Mountain job site, the evidence established that, in fact, many local residents were hired as construction laborers when work for which they were qualified was available, that they were hired without reference to Union affiliation, that most of them did not belong to the Union at the time of hire and that some subsequently joined the Union voluntarily while others did not join at all. As above stated, the allegation with respect to the denial of employment to local residents at Big Mountain (which served as a basis for the whole proceeding) were held not to have been sustained and were dismissed.

At the conclusion of the General Counsel's presentation of its case at the hearing before the Trial Examiner, the Union moved to dismiss the consolidated complaint as to it and said motion was granted (R. 320). The Trial Examiner found that the Company violated Section 8(a)(3) of the Act by withholding job assignments from five employees until they had joined the Union and obtained job clearances from it and that by engaging in such "discrimi-

natory hiring practice'' the Company violated Section 8(a)(1) of the Act. The Trial Examiner recommended, however, that all other allegations of the complaint against the company be dismissed.

The General Counsel filed exceptions to the Examiner's Intermediate Report, contending that the evidence adduced at the hearing established that the Union was a party to a closed shop arrangement violative of Sections 8(b)(1)(A) and 8(b)(2) of the Act. In this connection, the General Counsel pointed to the Company's practice, as found by the Examiner, of reserving employment out of its Anchorage office for persons who were members of the Union or able to secure its clearance and relied upon testimony to the effect that (1) the Company was ''allowed'' to specify the names of fifty percent of the employees to be dispatched by the Union; (2) the Company inquired as to whether particular job applicants were in good standing with the Union and accepted substitutes from the Union if such applicants were not in good standing; (3) on one occasion, a union job steward told a new employee that his first financial commitment was to pay his dues to the Union or he would be put off the job; and (4) on another occasion, the business representative of the Union told a prospective employee that he would be given a dispatch slip as soon as he completed his application for membership in the Union (R. 50, 51).

The Board found that the points relied upon by the General Counsel were sufficient to establish a *prima facie* case of violation by the Union of Sections 8(b)(1)(A) and 8(b)(2) of the Act through participation in an illegal closed shop and hiring hall arrangement and, accordingly, that the Examiner erred in dismissing the complaint as to the Union (R. 51). To afford the Union an opportunity to present its defense, the Board remanded the case to the Examiner for further proceedings *(ibid)*.

Pursuant to the Order of Remand, the Trial Examiner

advised the parties that the hearing would resume. In reply thereto, the Union informed the Examiner that "it rests and requests that the Supplemental Intermediate Report be based on evidence presently in the record" (R. 53). Shortly thereafter, the Trial Examiner issued his Supplemental Intermediate Report finding that the Union has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act by "performing, maintaining, or otherwise giving effect to an understanding, arrangement, and practice with [the Company], whereby employees or applicants for employment who were not members of Local 341, as well as to those who were members, must obtain clearance or dispatch slips as a condition of employment . . ." (R. 62). The Trial Examiner recommended that the parties cease and desist from engaging in certain unfair labor practices, and take certain affirmative action to effectuate the policies of the Act, including the reimbursement of five named individuals of any and all fees and dues paid by them to the Union (R. 63-64).

Upon consideration of the Examiner's Intermediate Report, as modified by the Supplemental Intermediate Report and of the exceptions filed thereto, the Board found with respect to the Examiner's finding that "the Company and the Union participated in an arrangement that required applicants for jobs as laborers to obtain, as a condition of employment, dispatch slips from the Union which were issued only after application had been made for membership therein" that "the record amply supports this finding, at least with respect to hirings by the Company at Anchorage, Alaska, in connection with work done under the Company's cost plus contract with Western Electric Company." (R. 81-82).

The Board entered an order against the Company and Local 341 requiring, *inter alia,* that (1) they cease giving effect to "any understanding, arrangement or practice . . . whereby applicants for employment must become mem-

bers of, and obtain clearance or dispatch slips from Local 341 as a condition of employment . . .''; (2) ''they refund to all present and former employees of Morrison-Knudsen hired by it at Anchorage, Alaska, under its cost plus contract with Western Electric Company, Incorporated, all initiation fees and other moneys paid as a condition of membership in Local 341 . . .'' (R. 85-88).

SPECIFICATION OF ERRORS

1. The Board erred in finding that the Company violated Section 8(a)(3) by conditioning the employment of the five college students upon joining the Union and obtaining clearance from it.

2. The Board erred in finding that the Company and the Union were parties to an arrangement, understanding or agreement, which required applicants for employment as laborers at Anchorage, Alaska, to obtain as a condition of employment dispatch slips from the Union which were issued only to union members or only after application had been made for membership therein.

3. Assuming, *arguendo,* that the Company violated Section 8(a)(3), the Board erred in finding that the Union was responsible for the unilateral acts of the Company.

4. The Board erred as a matter of law in holding under the circumstances herein that the operation of a non-exclusive dispatching service by the Union violated the Act.

5. In issuing its order, the Board acted arbitrarily and capriciously and therefore abused its discretion in that:

(a) the invocation of the reimbursement ''remedy'' was unwarranted, inappropriate, punitive and utilized, not for remedial purposes, but to coerce employers and unions in the construction industry to adopt the Board's criteria for the operation of an exclusive dispatching system;

(b) the application of the desistance order to ''any other employer'' was a blanket ban completely unwarranted under the circumstances of this case;

(c) the application of the desistance order to "in any other manner" violating employees' Section 7 rights was unwarranted because it sweepingly enjoins the commission of acts neither similar nor related to those actions which the Board found were unlawful.

SUMMARY OF ARGUMENT

The legislative history of the Act and subsequent Court decisions make clear that Board orders must be supported by substantial evidence, viewed in the light of the record considered as a whole, and that Courts of Appeal are empowered to review the "reasonableness" and "fairness" of Board decisions. In arriving at its two basic findings, the Board relied upon selected shreds of testimony concerning an isolated atypical incident involving the temporary summer employment of college students, ignored testimony and evidence which plainly support contrary conclusions, and indulged in unwarranted inferences, surmises and conjectures. First, contrary to the Board's findings, the evidence does not establish that the employment of the five college students was conditioned by the Company upon their joining the Union and obtaining clearances from it. Second, the evidence in the record does not sustain the Board's finding that there existed an arrangement or agreement between the Company and the Union which contioned employment of laborers from Anchorage upon membership in and clearance by the Union. Indeed, the record is barren of even a suggestion that the Union caused or attempted to cause the Company to discriminate in any manner against anyone; the Company recruited through many sources, including the Union, and employed both union and non-union men side by side. Even if the conduct of Company officials with respect to the employment of the five college students may have constituted a technical violation of the Act, the Union cannot be held responsible for their unilateral action.

The operation of a non-exclusive dispatching service by the Union to supply experienced manpower when and if reqested by employers, does not violate the Act, particularly where, as here, the Company was free to, and actually did, hire outside of the Union, without restraint, and the Union did not discriminate in referring applicants to the employer.

The extraordinary "remedy" of reimbursement is not only unwarranted by the circumstances of this case but its imposition herein reflects the Board's total disregard of the unusual problems posed by the construction of urgently needed, highly complicated national defense facilities erected in virtually inaccessible, uninhabited frontier areas of the United States. Under the circumstances of this case, reimbursement is a remedy which is inappropriate and punitive, constitutes an arbitrary abuse of the Board's discretion and contravenes the Fifth Amendment.

Moreover, the application of the Board's interdiction to "any other employer" constitutes a blanket ban which smacks too much of attainder to be acceptable to an Anglo-Saxon system of law. Further, the application of the desistance order to "in any other manner" violating employees Section seven rights is beyond the scope of the Board's authority because it enjoins the commission of acts neither similar nor related to those actions which the Board found were unlawful.

ARGUMENT

I. The Findings of the Board Are Not Supported by Substantial Evidence on the Record Considered as a Whole.

The legislative history of the Act makes it plain that Board decisions must be supported by substantial evidence on the record as a whole and clarifies the power of Courts of Appeal to review "the reasonableness" and "fairness" of Labor Board decisions. The House Committee Report

(No. 245, H. R. 3020, 1 Leg. Hist. 332) complained that the Board was relying upon "imponderables", "findings, overwhelmingly opposed by the evidence," "findings that strain our credulity." As H. Conf. Rept. No. 510 on H. R. 3020, 80th Cong. 1st Sess. at pp. 55-56 stated:

> "(T)he courts . . . will be under a duty to see that the Board observes the provisions of the earlier sections [10(b) and 10(c)] and that it *does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reason* for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions. It is believed that the provisions of the conference agreement relating to the court's reviewing power will be adequate to preclude such decisions as those in . . . [the] *Republic Aviation* and *Le Tourneau,* etc. cases . . . without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10(e) of the amended act." (Emphasis supplied.)

Subsequently, the United States Supreme Court in *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474 stated at p. 488:

> "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

This is precisely the type of "fringe or borderline case, where the evidence affords but a tenuous foundation for the Board's findings", which requires this Court to "scrutinize the entire record with care", and "where there has been some contrariety of opinion between the Board and the Trial Examiner", as in the instant case, "the evidence

must be examined with greater care than when both the Board and the Trial Examiner are in complete agreement." *Joy Silk Mills, Inc.*, v. *NLRB*, 185 F. 2d 732, 742 (CADC), cert. denied 341 U.S. 914.

In making its two basic findings, petitioner contends, the Board relied upon scraps of testimony which appear to substantiate such findings, ignored testimony and evidence which plainly support contrary conclusions, indulged in unwarranted inferences and improperly regarded circumstances which might possibly raise a suspicion of illegal conduct as sufficiently substantial to support a finding. See *NLRB* v. *Citizen-News Co.*, 134 F. 2d 970, CA 9.

A. First, the Board adopted the finding in the Trial Examiner's Intermediate Report that "the Company violated Section 8(a)(3) and (1) of the Act by conditioning the employment of Abolins, Crowe, Garnes, Bleeck and Wyman upon their joining the Union and obtaining clearance from it" (R. 81).

The Trial Examiner based this finding primarily, if not solely, upon the testimony of Abolins, Crowe and Garnes concerning their initial job interview with a Company official, the essence of which was, according to the Trial Examiner, that Haugen, the Company official "stated, in effect . . . that they would have to join Local 341 in order to obtain a laborer's job with M-K". Despite their concurrent participation in the meeting with Haugen, their recollection as to what actually was said is at such variance as to afford little, if any, basis for a finding.[3] Only Garnes

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[3] Mr. Abolins (R. 172):

"We went into the offiee. We saw a gentleman there, I don't know who it was now, but he told us that they had been expecting us. We had identified ourselves to him and he said that we would have to go through the Union Hall and then they would dispateh us to the job site."

Mr. Crowe (R. 203):

"The man we talked to, he said he had expected us, that we

was "quite sure" that "Haugen said we had to join the Union before we could go to work" (R. 219). Crowe could not recall "what he said exactly" nor could he recall anyone telling them that they had to join the Union (R. 210-211). Nor could Abolins remember Haugen's exact words, his recollection being limited to an alleged "intimation" that Haugen intended to convey (R. 188). Bleeck, the fourth student, did not testify and Wyman, the fifth student, whose testimony with respect to joining the Union both the Trial Examiner and the Board chose to ignore despite the fact that he was a witness called by and on behalf of the General Counsel, testified as follows (R. 313-314):

Q. Can you state whether in fact you asked him [Company official] about whether you could join the Union or whether he asked you, told you to join the Union, do you recall that?

A. Certainly, Nobody told me to join the Union. At no such time did I ever feel that there was anybody telling me to join the Union . . . I know that Alaska is in effect not a closed shop and that I didn't have to join the Union.

Q. You knew you did not have to?

A. Certainly, I was aware of that.

* * *

Q. But you joined the Union of your own volition?

A. I can honestly state that nobody told me to join the Union.

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had jobs, that there were a couple of steps to go through and we would be sent out immediately. First, we would have to see the Union, then to M-K employment office for dispatch."

* * *

"I don't know what he said exactly. He said one of the first steps would be to go through the Union and then through dispatch."

Mr. Garnes: (R. 213):

"He talked to us a little bit about school and everything, and then he said that we would have to join the Union before we could work, and he would call Mr. Groothuis to come over."

Thus, of the five college students whose employment was found to have been conditioned "upon their joining the Union and obtaining clearance from it", one student did not testify, one student was positive that "nobody told me to join the Union," one student was only "quite sure" that he was told he had to join the Union, one student subjectively evaluated his conversation with a Company official as intending to convey an "intimation" that he had to join the Union and the remaining student had no recollection of anyone telling him that he had to join.[4] There is no evidence in the record, even to suggest that the basis upon which the Company afforded employment to Wyman differed from that of the other students. Clearly, then, we submit, in the absence of any evidence establishing that Wyman's employment was conditioned upon joining the Union, the different versions of their initial job interviews, as presented by Abolins, Crowe and Garnes, cannot possibly be regarded as such "substantial evidence" as to afford a basis for the conclusion that they were told directly or indirectly that they had to join Local 341 in order to obtain a laborer's job.

Moreover, that these students did not, in fact, have to join the Union to obtain a job is made eminently clear from the record. First, there is absolutely nothing in the record which establishes or even suggests that refusal to join the Union precluded employment. Indeed, the record plainly shows that many non-union persons were employed by the Company. Second, the record also clearly establishes that these students, in fact, were employed by the Company as laborers even before they arrived in Alaska or before they spoke to the Union's representative, that they knew they had jobs before leaving for Alaska and

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[4] It is highly significant that there is not even a scintilla of evidence in the record that the Union's representative Groothuis told any of the students that they had to join the Union.

that there never was any question in their mind as to having such jobs. (R. 199, 203, 210, 218-219, 314.)

Employment of the five college students was no more conditioned upon their obtaining clearance from the Union than upon their joining. Plain common sense dictates that there can be no possible reason for requiring five college students to be "cleared" by the Union for employment when they had been hired prior to their arrival in Alaska and the Company employs many non-union persons who are employed without union "clearance." Apparently both the Trial Examiner and the Board failed to comprehend the function and significance of "dispatch slips" given to some new employees by the Union. The inference drawn by the Trial Examiner and the Board that the issuance of such dispatch slips is tantamount to "clearance" by the Union is not predicated upon any evidence whatsoever that union clearance was an essential precondition of employment. It simply does not follow that union issuance of dispatch slips proves that the Union "cleared" prospective employees.

The only evidence in the record pertaining to the purpose and role of "dispatch slips" unmistakably establishes that their issuance had no significance with respect to being or not being hired; issuance was simply a ministerial task undertaken by the Union as a technique for enabling the Union, as the collective bargaining representative of the employees, to know the names of persons being hired and where they are being assigned to work by the Company,[5]

[5] Under the terms of the collective bargaining agreement the Company was required to notify the Union of the names of the persons whom it hired. In the absence of a dispatch slip system, the Company would have had the burden of notifying the Union, presumably even with respect to those referred by the Union in response to the Company's request. Whether the Company notified the Union directly or told the employee to go to the Union and give notification and receive a dispatch slip as evidence of such notification is of no import, we submit, to a determination

and as a device, generally, for the Company to know that a person reporting to a job is the man who the Union has referred to the Company in answer to the Company's request. Such evidence has been completely ignored by the Trial Examiner and the Board.

The evidence in question establishes that a considerable portion of the labor hired by the Company in Alaska is hired through the Union because the Union renders a real and valuable service in keeping track of the location of qualified construction laborers, in being familiar with employee's skills and employers' needs and in being able most effectively to supply necessary applicants. In short, the Union is in the best position to supply qualified manpower expeditiously and, particularly so, in locations such as the rural areas of Alaska where skilled and semi-skilled manpower for large construction projects is extremely limited and dispersed (R. 335-6, 329-330, 335).

In order to avoid mistakes and duplications, the Union, in filling a Company's request for applicants, issues to the persons referred to a Company so-called "dispatch slips" which are delivered to a Company by the applicant reporting for interview as evidence that the reporting applicant is the man whom the Union has referred in compliance with the Company's request. Because a large part of laborers hired had presented themselvs with a dispatch slip from the Union, Company personnel in Anchorage handling employment were apparently under the impression that they should require a dispatch slip. But there is no evidence whatsoever that they were ever advised that a dispatch slip was necessary (R. 148), nor is there any evidence that employment was refused to anyone who did not

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of whether employment was conditioned upon union membership or clearance, particularly where the record is utterly devoid of evidence that the Union conditioned issuance of a dispatch slip upon union membership or that the Union ever refused to issue a dispatch slip to any employee requesting one.

have a dispatch slip. On the other hand, there is substantial evidence that many persons were employed who did not have such a slip (R. 351-2, 360).

Accordingly, when Mr. Haugen called the Business Representative of the Union on June 11, 1956, and told him that "the boys were in my office and would be dispatched to the job, either that day or the following day", the call was plainly made in connection with obtaining the dispatch slips for the students. But neither this telephone call nor the fact that the Business Representative thereupon came to the company's office to request the students to make application for Union membership "buttresses", as the Trial Examiner stated, the finding that "Haugen stated, in effect, . . . that they would have to join Local 341 in order to obtain a laborer's job." A union representative is not precluded from soliciting members and the fact that he becomes aware of potential members as result of a telephone call from an employee of a Company in connection with a matter unrelated to union membership neither establishes the fact that the Company unlawfully encouraged membership nor that employment was conditioned upon membership. The record is clear that employment, in fact, preceded the meeting between the students and Business Rpresentative of Local 341, that the students made application for union membership without protest, that they had no objection to such act, that they did not inquire as to whether they had to join the Union or not, that they were not required to pay either initiation fees or dues at the time of making application and that they were immediately dispatched to job sites without becoming full-fledged union members by paying their fees and dues (R. 195, 207-8, 217).

B. Second, the Board also adopted the finding in the Trial Examiners' Supplemental Intermediate Report that "the Company and the Union participated in an arrangement that required applicants for jobs as laborers to obtain, as a condition of employment, dispatch slips from the

Union, which were issued only after application had been made for membership therein'' (R. 81-2). Significantly, the Board somewhat hedged its adoption of this finding by stating that the record supports this finding "at least with respect to hirings by the Company at Anchorage, Alaska, in connection with work done under the Company's cost plus contract with Western Electric Company'' (R. 82). This limitation, of course, was necessitated by the total absence in the record of any evidence, other than that concerning the circumstances of the employment of the five college students who performed work under the Western Electric contract, upon which such a finding could be based. But it is strange indeed, we submit, that the Company would have a hiring "arrangement" for part of its operations (Western Electric sub-contract) and no such "arrangement" for the remainder of its work, and that if it did, in fact, have such an "arrangement" for all of its construction activities, no evidence of such was available for presentation by the General Counsel.

This finding is obviously one which the Trial Examiner did not initially feel impelled to make on the basis of the record. As hereinbefore pointed out, at the conclusion of the General Counsel's presentation of his case, the Union's motion to dismiss the complaint as to it was granted, an action taken by the Trial Examiner presumably pursuant to his judgment that the record as a whole did not establish the existence of an illegal "arrangement" in which the Union participated. But, the Board, in effect, sustained the Exceptions of the General Counsel to the Intermediate Report [6], reversed the Trial Examiner and issued an Order

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[6] In his exceptions, the General Counsel urged that the evidence established that the Union was a party to a closed shop arrangement and pointed to the testimony to the effect that (1) the Company was ''allowed" to specify the names of fifty per cent of the employees to be dispatched by the Union; (2) the company inquired as to whether particular job applicants were in good

of Remand, as a consequence of which the Trial Examiner, being bound by the Board's finding of a *prima facie* case, was compelled to reverse his earlier decision. To sustain this latter decision the Trial Examiner found it necessary for the first time to rely upon the testimony of Raoul Wargny as the basis for his finding that an illegal "arrangement" existed.

Apparently, the testimony of Wargny was not accorded any credence by the Trial Examiner prior to the issuance of his Intermediate Report[7] and the subsequent credit given to that testimony by both the Trial Examiner and the Board simply is not justified by the record. Wargny was the personnel man for the job here involved. He testified that it was up to him to obtain men for the site superintendents upon their requests (R. 158), and that he only had two sources, the Company's files and the Union. From the record, it is obvious that Wargny was new to this job and that he did not know the job classifications or the skills involved (R. 150), and that he therefore had to depend in large measure upon the Union to assist him in performing his job. He was subsequently involuntarily terminated by the Company (R. 328), and was, it is reasonable to assume, unfriendly toward his former employer.

Wargny testified that "good standing" meant good standing with the Company, and that "eligible for re-hire" related to whether or not the employee had an "eligible for re-hire" slip in his folder, which was maintained in the

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standing with the Union and accepted substitutes from the Union if such applicants were not in good standing; (3) on one occasion, a Union job steward told a new employee that his first financial commitment was to pay his dues or he would be put off the job, and (4) on another occasion, the business agent of the Union told a prospective employee that he would be given a dispatch slip as soon as he completed his application for membership in the Union (R. 50-51).

[7] Under the *Universal Camera* decision, *supra*, it is the function of the Trial Examiner to evaluate the credibility of witnesses.

personnel department of the Company (R. 146). Yet, it is obvious that the Trial Examiner in his Supplemental Intermediate Report attached a different meaning to Wargny's testimony (he apparently took contradictory testimony by Wargny, found elsewhere in the record (R. 134)) and found that "eligible to be dispatched for hiring" meant eligible insofar as Local 341 was concerned. Wargny also testified that, although he told members of the Union that they would have to go to the Union to get dispatched, no one had ever told him that that was the Company's policy (R. 147-8). When asked whether he knew what was required to secure a dispatch slip, Wargny answered "No", but he assumed that "you have to join the Union first before you can get a dispatch slip" (R. 155).

In addition to indulging himself in assumption, Wargny was contradictory in his testimony. On cross-examination, Mr. Wargny was asked whether he ever told the college men involved that they had to join the Union. His answer was an unequivocal, "No, sir." (R. 153). Yet, on pages 152-155 of the Record, he contradicts himself. First, he says that he didn't tell them that they had to join the Union (R. 153); then that they would have to join the Union (R. 154); and, finally he states that when they came into the office he told them to go down to the Union to get their dispatch slips, that they would have to join the Union (R. 154).

And, finally, Wargny specifically admitted that he never received instructions from his superiors to require dispatch slips, nor demands that such slips be obtained from Union representatives (R. 147-8); that although he could remember an instance when the Union had refused to send a man, he could neither remember the person's name nor whether he had been subsequently hired by the Company (R. 160); that he had not been told that he could not hire non-union persons (R. 161); that, in fact, he could hire non-union workers (R. 161); and that while he was Personnel Manager for the Company he was neither told, nor was

aware, of any agreement between the Company and Union to the effect that only Union members would be hired and that the Company would use the Union as its sole source of recruitment of labor (R. 169).

We submit that the testimony of Wargny affords little, if any, basis for a finding that there existed "an agreement, understanding and practice that required laborers who were not members of Local 341 . . . to obtain dispatch slips . . . as a condition of employment."[8] Such a finding completely ignores the credible testimony of Mr. Einar Erickson (R. 326, 328-9) which is in direct conflict with that of Wargny's as well as the testimony of various employees, namely, Rickteroff, Olympic, Endrus, Wassaille, Enolon and Drew to the effect that they had obtained jobs without clearance through the Union and, in some instances, had never joined the Union even though they performed work under the Union's jurisdiction. Whatever slight inferences Wargny's testimony, if credible, might possibly raise, they are negated by the record as a whole, particularly in view of the absence in the record of any evidence of actual discrimination or refusal to dispatch or of any evidence either in the form of a contract or otherwise that the Union had demanded and the Company had acceded to such arrangement as found by the Board. We submit that Wargny's testimony does no more than reflect his personal assumptions concerning, and misunderstanding of, the dispatch functions.

The significance of Wargny's testimony is underscored by the Board's reliance thereon in its Order of Remand which specified four items of testimony which it held established a *prima facie* case of an illegal agreement between the Company and the Union.

(1) Item No. 1 was Wargny's unsupported testimony

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[8] "This evidence is not the kind that responsible persons are accustomed to rely on in serious cases." *NLRB* v. *Englander,* 260 F. 2d 67, 72 (CA9).

that the Company was "allowed" to ask for fifty per cent of its employees by name. On the other hand, Sean Brady, another Company personnel man, testified that there was neither an arrangement with the Union as to a limitation on named requests nor that there was anything ever written in this connection nor was he ever instructed by the Company that it could request only a certain percentage of named people. (R. 227).[9] In addition, Wargny's superior, Einar Erickson, testified that there was no such understanding (R. 329, 351). Assuming, *arguendo,* the existence of such an understanding, it neither violates the law nor constitutes proof of the existence of an illegal hiring arrangement requiring membership in the Union as a condition of dispatch.

(2) Item No. 2 involves Wargny's testimony that the Company inquired as to whether particular job applicants were in good standing with the Union and accepted substitutes from the Union if such applicants were not in good standing. This evidence has apparently been misconstrued by the Trial Examiner and the Board as indicative of a discriminatory practice despite Wargny's own testimony that "good standing" meant "a man that hadn't been discharged from his job before, or he had an eligible for rehire slip, eligible rehire in his folder, which we maintain in the personnel department in Anchorage." (R. 146). In any event, in view of Wargny's failure to recall any specific instance other than the one alleged instance in which the Union did not "want" to dispatch an unidentified person (R. 160), we submit that it is unreasonable to predicate a finding that a discriminatory practice existed upon such insubstantial evidence.

(3) Item No. 3 relates to "one occasion" on which "a Union job steward told a new employee that his first fi-

[9] Brady testified that the Company had a self-imposed limitation on specific requests because it felt it was not "fair to continually ask for every man by name" (R. 228).

nancial commitment was to pay his dues to the Union or he would be put off the job." That such a statement affords little basis for a finding that there was a closed shop hiring hall arrangement is palpably evident. It constitutes, at best, nothing more than a gratuitous over-statement on the part of a job steward in a zealous attempt to solicit union members. The record is barren of any proof of the job steward's duties or authority, if any, with respect to removing workers for non-payment of dues and there is nothing in the record to establish a Company policy or agreement to fire a worker because he was not a union member. Indeed, there is no evidence that the job steward was ever told that the Company would fire an employee for refusing to be a union member and no evidence that any man was ever fired by the Company because of lack of Union membership. In the absence of such evidence in the record and in the presence of clear evidence that non-union persons were employed without ever becoming union members, an overzealous, unauthorized statement by a job steward on a remote construction site is hardly binding on the Union or probative of the fact that there was a tacit agreement, understanding or practice to the effect that union membership was a condition of employment with regard to hiring from Anchorage.

(4) Item No. 4 relates to "another occasion" on which the business representative of the Union told a prospective employee that he would be given a dispatch slip as soon as he completed his application for membership in the Union" (R. 51). This alleged evidence of a "practice" was ripped out of the fabric of the testimony of college student Wyman and has been accorded a meaning and significance wholly inconsistent with the tenor of Wyman's testimony. In substance, Wyman's testimony was that nobody ever told him that he had to join the Union, that at no time did he ever feel there was anybody telling him to join the Union, that he came to Alaska with the idea that he would join the Union because he intended to work during the summer,

that he knew that in Alaska there was no closed shop in effect, and that he did not have join the Union (R. 313). Mr. Wyman also specifically stated that Mr. Groothuis, on June 13, 1956, did not tell him that he had to join the Union (R. 315). When Wyman's testimony is viewed as a whole, then it is perfectly understandable that in a conversation between an employee and a Union business agent, where there has been conversation between them to the effect that the applicant is going to join the Union, the most natural thing in the world in response to a "When do I get a dispatch slip" is "Let's fill out the application first," or "After you fill out the application." It is unfair to draw an inference from the remark of Groothuis that there would be no dispatch slip in the absence of an application because the atmosphere is absolutely different than it would have been if Groothuis had been coercing or intimidating Wyman into joining the Union.

Accordingly, that Wargny's testimony does not afford a sound basis for the Board's finding is manifestly clear. As hereinbefore pointed out, the only testimony which conceivably could support such finding was that concerning the circumstances of the employment of the college students. We believe that such circumstances were, to say the least, unusual and cannot be regarded as indicative of a general practice. It must be remembered that these students were not residents of Alaska and that they were temporary unskilled employees hired in the State of Washington for a particular season. Obviously, they were not typical construction laborers. The construction season in Alaska is of short duration. Local residents who are regular construction workers must rely upon employment during this period as the principal means of sustaining themselves and their families over the year. In the face of the unemployment of local construction workers, Company officials may have felt that the employment of inexperienced non-residents would cause on-the-job difficulties which would be exacerbated by failure to join the Union. Hence, Haugen's telephone

call to Groothuis. But, to infer from this atypical isolated incident that a general practice prevailed requiring employees to join the Union before commencing employment is both illogical and unwarranted.

To conclude, as the Board did, that the record herein supports the findings which the Board adopted makes a mockery of the "substantial evidence" requirement of the Act. The whole record establishes, we submit, that the Union was only one of the Company's sources of labor, that the Company employed non-union persons, that laborers were employed without the necessity of obtaining Union clearance or dispatch slips, that no employees were fired for failing to join the Union, that there was no Union refusal to dispatch a non-union person and that there was no requirement that workers had to join the Union to secure a job. The Board's dismissal of the original charges which triggered the complaint substantiates this view. At best, the evidence relative to the employment of the college students reflects an atypical situation not indicative of a general policy of the Company nor does it constitute any proof of an illegal arrangement with the Union. Such evidence plainly does not afford a "substantial basis of fact from which the fact in issue can be reasonably inferred." *NLRB* v. *Columbian Enameling and Stamping Co.,* 306 US 292, 299.

II. It Is Not an Unfair Labor Practice for a Company to Obtain Part of Its Personnel Through a Dispatching Service Maintained by a Union.

Despite the absence in the record of any evidence establishing that the Union unlawfully discriminated against non-union members in supplying the Company with personnel or that the Company was required to, or actually did, hire all of its employees through the Union or that employees were required to join the Union in order to secure jobs, the Board nevertheless concluded that the Union violated the Act by participating in a closed shop arrange-

ment which required membership in and clearance by the Union as a condition of employment from Anchorage.

Section 8(b) (2) makes it an unfair labor practice for a labor organization or its agents to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)."

The crux of the prohibition therefore is encouragement or discouragement of union membership by discrimination in employment. As the Supreme Court has explained (*Radio Officers' Union* v. *NLRB*, 347 US 17, 42-43):

> "The language of Sect. 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations, only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

Turning to this case, the operation of a dispatching service by the Union with respect to some of the personnel employed by the Company would not be violative of the Act, in view of the Company's freedom to hire outside of the Union, because it entailed no discrimination in employment. Indeed, even if the record would establish, as it does not, that the Union dispatched only union members, the non-exclusive nature of the hiring arrangement between the Company and the Union would preclude a finding that such arrangement was violative of the Act. See, *Webb Construction Co.* v. *NLRB*, 196 F 2d. 841 (CA 8).

The collective bargaining agreement between the Company and the Union left the latter free to hire employees through the Union or otherwise and the record plainly shows that the Company utilized various sources to meet its manpower needs. The record also shows that not only was there no requirement that persons had to join the Union to secure jobs but that non-union persons were

actually employed. In short, the agreement between the parties was an "open shop" agreement (as the General Counsel conceded, (R.138)) and the construction projects on which employment occurred were "open shop" jobs. The Board, however, only considered one source of labor supply —the union—and inferred the existence of an illegal closed shop and hiring hall arrangement in complete disregard of the evidence in the record establishing the Company's right and practice of (1) hiring transfers from other jobs, (2) hiring directly, either natives or specific individuals including college students, (3) calling the Union to locate specific persons or for qualified applicants.[10] To meet the manpower needs of the industry on short notice the union maintains a dispatching service. This service is an economic instrument valuable to the employers and employees in regularizing employment, particularly in a case such as the instant one in which employment is at remote sites and the Union is in a better position than the Company to secure qualified manpower. For reasons of safety, specific job problems, intermittent construction, fluidity of operations and inability of employers to maintain a processing system of recruitment (as shown here), an employer tends to rely on a hiring hall to obtain a majority of his skilled men quickly.

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[10] The complaint in this case charged, in substance, that pursuant to a preferential closed-shop arrangement certain non-union natives had been discriminatorily denied employment on a particular job because they were not members of the Union. This charge was dismissed after evidence established that natives were employed and that they were not required to join the Union to obtain or maintain employment. Logically, this evidence should also have established the open-shop nature of the job. But the Board sidestepped this logical conclusion by finding the existence of a closed shop condition, *in part*. Thus, we have the Board arriving at an Alice-in-Wonderland conclusion that a job part union and part non-union is not an open shop but, rather, a closed shop job so long as the part that is non-union is ignored.

The foregoing analysis of the statutory terms and the validity of the non-exclusive dispatching service in this case are confirmed by the decisions of this and other Courts of Appeals. In essence these decisions have held that even where an *exclusive* dispatching service is maintained it is lawful so long as referral is made upon a nondiscriminatory basis, an employee being neither denied referral nor granted preference based on union membership or the performance of the obligations of union membership. A "referral system is not *per se* invalid" and its operation becomes invalid only "if the union applies it discriminatorily." *NLRB* v. *Philadelphia Iron Workers, Inc.*, 211 F. 2d 937, 943 (CA 3). See also *Eichleay Corp.* v. *NLRB*, 206 F. 2d 799, 803 (CA 3). "The factor in a hiring hall arrangement which makes the device an unfair labor practice is the agreement to hire *only* union members referred to the employer." *Del E. Webb Construction Co.* v. *NLRB*, 196 F. 2d 841, 845 (CA 8). "The action of an employer in hiring workmen through a union by means of referrals from the union, is held not to violate the Act, absent evidence that the union unlawfully discriminated in supplying the company with personnel." *NLRB* v. *F. H. McGraw and Co.*, 206 F. 2d 635, 641 (CA 6).

The position was elaborated by this Court in *NLRB* v. *Swinerton & Walberg Co.*, 202 F. 2d 511, 514, cert. denied, 346 U.S. 814 as follows:

> "An employer violates Sec. 8(a)(3) and (1) of the Act if he requires membership in a labor organization as a condition precedent to employment. *NLRB* v. *Cantrall*, 9 Cir., 1953, 201 F. 2d 853. The Board has contended that adoption of a system of union referral or clearance also violates the Act absent a "guarantee that the union does not discriminate against nonmembers in the issuance of referrals." We do not believe *National Union of Marine Cooks and Stewards*, 90 NLRB 1099 (1950) supports this view. Although it was there noted that the provisions of an applicable labor contract prohibited such discrimination, the

Board did not indicate that a referral system was *per se* improper absent a "guarantee" of non-discrimination. Such a rule would in practical effect shift the burden of proof on the question of discrimination from the General Counsel of the Board to the respondent. The rule which we deem proper was recognized by the Board in *Hunkin-Conkey Const. Co.*, 95 NLRB 433 (1951), where it was said an agreement that hiring of employees be done only through a particular union's office does not violate the Act "absent evidence that the union unlawfully discriminated in supplying the company with personnel." 95 NLRB at 435.

As the Court of Appeals for the First Circuit explained just recently (*NLRB* v. *International Association of Heat and Frost Insulators,* 261 F. 2d 347, 350):

> "It is not illegal for an employer to rely upon a union to provide it with employees. In some industries such as construction and shipping, where much of the work is necessarily of an intermittent nature and the employer's need for workers varies from day to day, a hiring hall or referral system has sprung up. Under this system, the employer calls upon the union to supply him with the necessary workers. However, if this system operates so as to discriminate against non-union workers and makes possible only the employment of union members, it is an unfair labor practice."

And the views which the First, Third, Sixth, Eighth and Ninth Circuits united in expressing were stated in 1950 by Senator Taft, the principal architect of the 1947 amendments of the Act (S. Rep. No. 1827, 81st Congr., 2d Sess., 14):

> "The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. * * * Neither the law nor these decisions forbid hiring halls, even hiring halls operated by unions, *as long as they are not so*

operated as to create a closed shop. * * *''* (emphasis supplied)

That this case does not present a closed shop situation is eminently clear. And such a situation may not properly be inferred from the unilateral conduct of the Company. Assuming, *arguendo*, that the Company did require as a condition of employment that employees clear through Local 341, there is no evidence to connect the Local or its Business Representative with the Company's unlawful conduct. Indeed, witnesses Wargny and Erickson denied the existence of any hiring arrangement between the Company and Union (R. 169, 329). The statements allegedly made by Haugen, a Company official, to the four college students were neither binding upon the Union nor proof of any such arrangement. And the conduct of the Business Representative Groothuis in soliciting membership plainly does not establish an agreement to confine employment to members of the Union, particularly in the absence of evidence that clearance was denied to non-members and the presence of evidence that non-members actually were employed without Union clearance. ''The burden of proof placed upon the General Counsel was not satisfied by a mere showing that the existence of such an agreement was consistent with the Company's unilateral conduct.'' *NLRB* v. *Thomas Rigging Co.*, (CA 9) 211 F. 2d 153, 157, cert. den. 348 U.S. 871. See also, *NLRB* v. *Brotherhood of Painters*, (CA 10) 242 F. 2d 477. If, indeed, the Company adopted a discriminatory hiring policy, ''many reasons may have motivated [it] . . . and it is not improbable that it voluntarily chose to do so on a unilateral basis'' (*Thomas Rigging Co.* case, *supra*).

We reach the question whether, apart from Section 8(b)(2), there was a violation of Section 8(b)(1)(A). The Board's finding of a violation of the latter provisions is derived solely from its finding of a violation of the former and has no independent significance. The two fall together.

III. "The Board Abused Its Discretionary Power by Issuing an Order Requiring (1) The Company and Union Jointly and Severally to Reimburse All Employees for the Dues and Initiation Fees Paid to the Union by the Employees, (2) Union Desistance from Certain Conduct as to "Any Other Employer," and (3) Union Desistance from Restraining or Coercing "In Any Other Manner" Employees in the Exercise of Their Section 7 Rights."

The Board's Order requires the Company and Local 341 jointly and severally to "refund to all its present and former employees hired at Anchorage, Alaska, for work under its cost plus contract with Western Electric Company, Incorporated, all initiation fees, dues, and other moneys paid as a condition of membership in Local 341" for the period beginning six months before the filing of the unfair labor charge. In explanation of this requirement the Board stated that (R. 83-84):

> "By the aforesaid unlawful hiring arrangement, the Respondents have unlawfully coerced employees to join the Union in order to obtain employment, thereby inevitably coercing them into the payment of initiation fees, Union dues, and other sums. In order adequately to remedy the unfair labor practices found, the Respondents should be required to reimburse employees of the Company for any initiation fees or dues, and other moneys, which have been unlawfully exacted from them as the price of their employment. Therefore, as part of the remedy we shall order the Respondents, jointly and severally, to refund to the employees of the Company hired at Anchorage, Alaska, for work under the Western Electric contract mentioned above, all initiation fees, dues, and other moneys paid by them to the Union as the price of their employment. We believe that these remedial provisions are appropriate and necessary in order to expunge the coercive effect of the Respondent's unfair labor practices."

An order cannot stand if it is "not appropriate or adapted to the situation calling for redress and constitutes

an abuse of the Board's discretionary power." *NLRB* v. *District 50, United Mine Workers,* 355 U.S. 453, 463. While broad, the Board's "power is not limitless; it is contained by the requirement that the remedy shall be 'appropriate', *Labor Board* v. *Bradford Dyeing Assn.,* 310 U. S. 318, and shall 'be adapted to the situation which calls for redress.' *Labor Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 348. The Board may not apply 'a remedy it has worked out on the basis of its experience, without regard to the circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act.' *Labor Board* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 349." Id. at 458.

As we now show, the reimbursement order in this case is not adapted to the wrong found but is a patent attempt to "prescribe penalties or fines" for its commission. *Republic Steel Corp.* v. *NLRB,* 311 U.S. 7, 10. Moreover, as applied to the circumstances of this case, reimbursement is a remedy which is "oppressive and therefore not calculated to effectuate a policy of the Act."

1. The Board has invoked the extraordinary remedy of reimbursement without regard to the unusual circumstances surrounding the construction projects on which the alleged unlawful conduct occurred. National defense construction projects in remote areas of Alaska and elsewhere where the supply of qualified manpower is limited necessarily involves more than the usual coordination and cooperation between employers and unions if the job is to be performed expeditiously at a reasonable cost. Unless Union facilities are made available to employers in such situations to assist them in securing skilled manpower, it is not unreasonable to believe that the defense program will be seriously hampered. Union referral under such circumstances as are here present, particularly where there is no proscription of employment of non-union members, neither adversely affects commerce nor is inimical to the

general welfare. To scotch cooperation between employers and unions where circumstances make it essential by the mechanistic application of a "remedy" which might serve the purposes of the Act under different circumstances is, we submit, oppressive, unwarranted, and an abuse of power.

Not only has the Board applied a "remedy" without regard for the circumstances under which the alleged wrong occurred but its conclusion that a wrong occurred was reached by a process of reasoning from an inference "piled upon an inference, and then another inference upon that . . ." *Interlake Iron Corp.* v. *NLRB,* 131 F. 2d 129, 133 (CA 7). From the Board's inference that an arrangement existed whereby employment was conditioned upon joining the Union, it then infers that employees therefore joined the Union to safeguard their opportunities for employment. Since, the Board argues, joining the Union was induced by fear of discrimination, payment of union dues and fees as an adjunct of union membership was the product of that illegal inducement, and, accordingly, such dues and fees should therefore be refunded.

The Board indulges itself these inferences despite the absence of any evidence in the record to support them. For example, there is nothing in the record to establish when the "arrangement" commenced. Were all of the Company's employees hired after the institution of the "arrangement"? The Board must assume that they were. For if the employees joined the union *before* the operation of the dispatching service began, there is no basis for the Board's assumption that employees joined in order to protect their employment from discriminatory operation of the dispatching service. Membership which *preceded* the dispatching service could not have been caused by it. The Board assumes this critical fact—that membership followed rather than preceded the dispatching service—without an iota of evidence to support the assumption.

But the fundamental vice in the Board's position lies deeper still. For the Board assumes, in disregard of the whole history of the growth of the labor movement, that the employees had no important incentive to join Local 341 except to escape its presumed discrimination against them. Most of us have supposed that the reason for union membership is somewhat different. In 1921 the Supreme Court stated what was already then a commonplace (*American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209):

> "[Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth."

In fostering union organization and collective bargaining, the Act is based on the premise that these are needed to redress the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association . . ." (Sec. 1, para. 2) Through union membership and collective bargaining employees seek the benefits of employment standards "which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case* v. *NLRB,* 321 U.S. 332, 338. There is no evidence in the record to support an assumption that in this case the union membership of the employees was not part of this main stream. There is substantial evidence to the contrary.

As with any other order, so with a refund order, it must be shown to justify it that the order eradicates "a *consequence* of the unfair labor practices found by the Board . . ." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 236. Damages are not recoverable unless they are "the certain result of the wrong," "definitely attributable to the wrong . . ." *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 562. And, in this case, it simply does not stand established that union membership and the payment of dues and fees, was the consequence of discriminatory operation of the dispatching service. It "is left to mere conjecture to what extent membership . . . was induced by any illegal conduct . . ." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 238. Local 341 "was entitled to form" its organization. It was entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. The Board's assumption that the Company's employees paid union dues and initiation fees to Local 341 involuntarily also completely ignores the fact that Local 341 was the unchallenged majority representative of such employees and enjoyed such status despite the absence of a check-off and union security provision in the agreement. Experience has demonstrated overwhelmingly that employees who choose to be represented by a union in collective bargaining also choose to pay union dues and fees to it.[11] Employees voluntarily pay fees and dues because they know

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[11] When the 1947 amendments to the Act were adopted, the proviso to Section 8(a)(3) was amended to provide that a union security agreement could only be valid "if, following the most recent election held as provided in Section 9(e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to

they cannot have the benefits of union representation without contributing to its cost. The negotiation of an agreement costs money, as does its administration. Dues and fees go towards defraying the cost. They do not repose in depositories. It may safely be assumed that much of the fees and dues collected in this case have been expended to pay for service. To require the reimbursement of dues and fees at this late date does not simply mean that the employees will have received the benefits of union representation without contributing to their cost. The moneys for

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make such an agreement. . . .'' This requirement was repealed on October 22, 1951 (Public Law 189, 82d Cong. 1st Sess.), it having proved ''burdensome and unnecessary.'' *NLRB* v. *Gaynor News Co.*, 197 F. 2d 719, 724 (C.A. 2), affirmed 347 U.S. 17. Its pointlessness was manifest from the results of the union shop authorization polls conducted by the Board. Thus, for the fiscal year ending June 30, 1951, of 1,335,683 valid votes cast in such referendums, 1,164,143, or 87.2% of the employees, voted in favor of the union shop. (NLRB, Sixteenth Annual Report, p. 306 (1951).) The same was true of the preceding years. In 1950, of 900,866 valid votes, 89.4% favored the union shop (NLRB, Fifteenth Annual Report, p. 235 (1950)); in 1949, of 1,471,092 valid votes, 93.9% favored the union shop (NLRB, Fourteenth Annual Report, p. 172 (1949)); in 1948, of 1,629,330 valid votes, 94.2% favored the union shop (NLRB, Thirteenth Annual Report, p. 111 (1948)).

This overwhelming demonstration that employees voluntarily favor the adoption of union security agreements forever puts the quietus to the notion that employees pay dues and fees unwillingly. These agreements operate compulsively only as to that small group known as ''free riders, i.e. employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union . . .'' *Radio Officers' Union* v. *NLRB*, 347 US 17, 41. Such agreements are the means by which a majority of the employees can require a negligible minority to pay their own way. But that the vast majority willingly pays was demonstrated by their willing authorization of a contractual obligation to pay.

reimbursement must come from somewhere, and insofar as Local 341 is concerned, they must come from the dues and fees paid by those members of the Union not employed by the Company, some of whom may not have been employed by the Company because of its hiring of local residents, college students and non-union members. Such a consequence highlights the inappropriateness of the Board's order.

Furthermore, aside from the negotiation and administration of an agreement, unions undertake to provide for their members many valuable benefits which are intra-union in character. Death or disability plans, mutual insurance and vacation benefits are among these. To drain the union's treasury by requiring the refund of dues and fees may seriously jeopardize its ability to meet existing commitments and prudently to undertake additional benefit programs. Indeed, under this Union's Constitution, compulsory reimbursement will automatically cause the employees affected thereby to lose their "good standing" in the Union with a consequent loss of rights to such benefits, the right to hold or run for union office, and other valuable rights which are conditioned upon continuous good standing in the Union. We submit that where there is an unchallenged majority representation not as consesequence of an illegal agreement or arrangement, then there is a presumption of non-coercion attaching, so that the deprivation of valuable property rights through the application of a compulsory reimbursement doctrine, without a hearing to determine whether a particular employee has been coerced, constitutes the deprivation of property without due process of law within the Fifth Amendment to the Constitution of the United States.

The application of the reimbursement remedy in this case will not only deprive employees of valuable property rights attendant upon union membership. It also deprives employees of their statutory right to join and assist a

union of their own choosing. Since this is not a case of a company-dominated union which is deemed inherently incapable of fairly representing its members, the denial of the right to join as a consequence of the Board's Order represents punitive rather than remedial action, and, accordingly, constitutes an abuse of the Board's discretionary power. As the United States Supreme Court has pointed out, the Board's "power to command affirmative action is remedial, not punitive." (*Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 236) "The Act does not prescribe penalties or fines." *Republic Steel Corp.* v. *NLRB,* 311 U.S. 7, 10), nor is the "deterring effect" of any order "sufficient to sustain" it, for the Board would then "be free to set up any system of penalties which it would deem adequate to that end." (id. at 12)

The current use of the refund order is in deliberate disregard of the Board's limited remedial authority.[12] The attribute of the order which lends it to punitive application, apart from the aspects above noted, is the staggering financial liability it entails.[13] This potential liability makes it virtually impossible for a union and an employer to resist yielding to the Board's conception of a valid referral system of employment, a conception set forth in its

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[12] In its present posture the refund order has come to be known as the Brown-Olds remedy, the name being derived from the case in which the current version of the refund order was devised. *Brown-Olds Plumbing and Heating Corp.,* 115 NLRB 594.

[13] A contested proceeding before the Board, from the filing of the charge through the enforcement of the order by a Court of Appeals, usually takes about three years. Since the liability to refund the dues begins to run from the date six months preceding the filing of the charge, an enforced refund order against a local union of two thousand members paying four dollars per month would require the repayment of $280,000 plus initiation fees received during the period.

decision in *Mountain Pacific Chapter of the Associated General Contractors,* 119 NLRB 883 (currently pending in this Court). In that decision the Board formulated the three requirements for inclusion in agreements establishing referral system of employment.[14] Significantly, however, the order in *Mountain Pacific* did *not* require the refund of dues and fees, thus showing that as of the date of that decision, April 1, 1958, the Board did not deem reimbursement essential to an effective remedy in a referral system situation.

The *Mountain Pacific* case involved an exclusive hiring hall arrangement. The application of the Brown-Olds remedy in this case reflects an effort on the part of the Board to extend the standards formulated in *Mountain Pacific* to a non-exclusive hiring hall situation. In effect, this constitutes an administrative effort to overrule the judicial approval accorded non-exclusive referral systems. See, Point II, *supra.* At the same time, the Board is attempting to utilize the standards formulated in *Mountain Pacific* as a vehicle for extending the Brown-Olds decision (where

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[14] The three requirements are:

1. Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies or requirements.

2. The employer retains the right to reject any job applicant referred by the union.

3. The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

the agreement provided for a closed shop) to the instant case involving an open shop situation.[15]

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[15] In *Virginia Electric and Power Co.* v. *NLRB,* 319 U.S. 533, the Supreme Court held that an order requiring the refund of dues and fees was within the Board's power and that exercise of that power was within the Board's discretion in the particular circumstances of that case. The ruling circumstances in *Virginia Electric* was the company-dominated character of the union. The rationale extended to active support of the Union by the employer which, although short of domination, was so serious as effectively to impair the union's independence (*NLRB* v. *Parker Brothers,* 209 F. 2d 278, (CA 5)), and this was essentially the situation in *Broderick Wood Products Co.,* 118 NLRB 38, enforced, 261 F. 2d. 548 (CA 10). In all other cases a refund order was entered only in favor of employees specifically found to have been individually coerced into paying fees and dues. *NLRB* v. *Local 404,* 205 F. 2d 99, 101, 102, n. 2 (CA 1), enforcing, 100 NLRB 801, 809, 811, 812; Board Member Peterson dissenting in *Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594, 605-606.

The Board began to withdraw from the judicially established criterion of domination or its virtual equivalent in *Hibbard Dowel Co.,* 113, NLRB 28, where it appears to have founded a refund order solely on the contracting union's lack of majority status at the time of its original entry into the union security agreement. See also, *Bryan Mfg. Co.,* 119 NLRB 502, enforced, CADC No. 14257, February 27, 1959.

The Board took its next step in *Brown-Olds Plumbing and Heating Corp.,* 115 NLRB 594, where the representative status of the contracting union was undisputed, but where the agreement it entered into provided for a closed shop, a form of union security in excess of the maximum permissible under the Act. The Board founded the refund order upon the closed shop feature of the agreement and disregarded the untrammelled character of the union's majority status.

There has thus been a progressive watering down of the conditions deemed essential for imposing the refund remedy from the original stringent requirement of domination or its virtual equiv-

The wedding of *Mountain Pacific* and *Brown-Olds* and the coercive and punitive character of the latter as a "spur" to contracting parties "to conform their . . . hiring practice to the requirements of *Mountain Pacific,* has been made manifestly clear. As the General Counsel stated in an address at the 1959 Southeast Trade Exposition on March 21, 1959, "It was . . . in the *Los Angeles-Seattle Motor* case [that the Board] linked *Mountain Pacific* to the *Brown-Olds* rationale" (mimeo. copy, p. 6). He stated in the same address that "The subsequent history of the *Mountain Pacific* decision has been, in large part, a concerted program by this Agency to encourage appropriate affirmative action by the contracting parties to conform their collective agreements and hiring practices to the requirements of *Mountain Pacific.* In this respect, the major spur has been the so-called *Brown-Olds* remedy . . ." (*id.* at p. 5) The spur was identified as "imposing a liability which may involve substantial sums of money" (*id.* at p. 7), and, he stated, "deterrence is the underlying consideration" (*id.* at p. 8).

This theme has been emphasized by the General Counsel

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alent. As the General Counsel of the Board has explained, what the Board has done "was to extend the broad reimbursement order, theretofore reserved for Section 8(a) (2) situations, to payments coerced under illegal union security or hiring arrangements with any unions even if not employer-dominated or supported." Address, June 27, 1958, 42 LRRM, 101, 102.

We believe that the judicial attitude is still that expressed by the Coard of Appeals for the Second Circuit: "The validity of reimbursement orders necessarily depends upon the peculiar circumstances of each case." (*NLRB* v. *Adhesive Products Corp.,* 258 F. 2d 403, 409); refund orders will not be upheld where based on generalizations which fail realistically to reflect the actual situation (*NLRB* v. *McGough Bakeries Corp.,* 153 F. 2d 420, 425 (CA 5); *NLRB* v. *Shedd-Brown Mfg. Co.,* 213 F. 2d 163, 170-171 (CA 7); *NLRB* v. *Braswell Motor Freight Lines,* 213 F. 2d 208 (CA 5).

in repeated speeches. In an address to the Building Industry Employees of New York State on June 27, 1958, he stated: "The purpose of the Board in fashioning the Brown-Olds reimbursement remedy is to effectuate the policies of the Act by prevailing upon employers and unions to correct their illegal union-security arrangements" (42 LRRM 101, 103). In an address to the Illinois State Bar Association on November 7, 1958, he referred to the Brown-Olds remedy as "the first time employers and unions were to be held liable in a monetary sense for illegal union security or hiring arrangements. This liability potentially involves substantial sums of money . . ." (mimeo. copy, p. 4).

But the frankest avowal of the coercive and punitive character of the Brown-Olds remedy was given by the General Counsel in an address to Rutgers University Conference on September 30, 1958. He stated that the "use that has been made of this extraordinary remedy . . . demonstrates vividly the capabilities of administered pressure and persuasion . . ." (mimeo. copy, 6). He observed that "if employers and unions are to avoid serious consequences, these illegal arrangements must be eliminated. Liability potentially involves substantial sums of money . . ." (*id.* at p. 7,) He stated that, as the parties became aware of the "serious monetary risk" they ran, they undertook to conform their agreements to the Board's requirement, and during this time "over the heads of the parties hung this statutory sword of Damocles—the constant awareness that *Brown-Olds* would be applied in full" (*ibid*). He concluded that, in withholding the refund remedy during the period of the moratorium and threatening to impose it thereafter, "we paid heed to the homely adage of one of our very own citizens, who practiced what he preached at the turn of this twentieth century. I refer to President 'Teddy' Roosevelt. He carried a 'big stick' and with it he went far. We spoke softly and carried a 'big sword', and the results to date have been heartening" (*id.* at p. 8).

These sentiments were echoed by Board Member John H. Fanning, who, in referring to the refund order in a hiring hall case, stated that the Board "put teeth into the law . . ." (Address to the American Society for Personnel Administration at Jacksonville, Florida, February 6, 1959, p. 8).

It is patent that the Board is exercising punitive power, although the power it has is "remedial, not punitive." It is patent that the Board is imposing a penalty to coerce compliance, but the "Act does not prescribe penalties or fines." And when the General Counsel states, as he does, that "deterrence is the underlying consideration", it suffices to say, with the Supreme Court, that "it is not enough to justify the Board's requirements to say they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Republic Steel Corp.* v. *NLRB,* 311 US 7, 12.

2. Apart from the inappropriateness of the Order issued herein because of the punitive nature of the remedy invoked, the order should be set aside because the Board did not have the power to issue a broad cease and desist order requiring the union to cease certain violations not only as to the employer named in the complaint but also as to "any other employer" when there was no threat made by the union to engage in illegal practices with respect to "any other employer". See *International Brotherhood of Teamsters, Local 554* v. *NLRB,* 262 F. 2d 456 (CADC) "In cases involving such broad orders the Board not only must make a finding based upon substantial evidence on the record as a whole that the blanket order is required but it must also convince the Court that such an order is needed" (*id.* at 462) In the instant case no such finding has been made and, we submit, there is no substantial evidence which would support such a finding. Indeed

the order has been so broadly drawn as to be patently absurd, as evidenced by the language of Paragraph B(1) (a) of the order which requires the union to cease and desist from "maintaining or otherwise giving effect to, any understanding, arrangement, or practice . . . *with any other employer,* whereby applicants for employment must become members of, and obtain clearance or dispatch slips from, Local 341 *as a condition of employment with Morrison-Knudsen*" (R. 87) (Italics supplied).

Under the circumstances of the instant case wherein the Board found that illegal acts were committed only with respect to part of the operations of a single employer (the Western Electric contract), the issuance of a desistance order with respect to "any other employer" is singularly inappropriate. This is not a situation analogous to that found in *NLRB* v. *Sun Tent-Luebert Co.,* 151 F. 2d 483 (CA 9), wherein this Court enforced a broad order based on a Board finding that the unfair labor practices were committed as part of a coordinated plan to assist all employers in restraining and coercing employees in the exercise of their rights. In that case the record showed a general attitude from which the Board inferred an intent to nullify the Act for all employers and employees in Southern California, thus indicating that the future commission of proscribed acts might be anticipated. Under such circumstances, a broad order was warranted but, here, there is an absence of any evidence which even suggests a general attitude or conduct to violate the provisions of the Act in the future or on an extensive scale and, accordingly, a broad order is not warranted, See *Richfield Oil Corporation* v. *NLRB,* 143 F. 2d 860 (CA 9).

This view is in accord with the decision in *Bee Lines Mfg. Co.* v. *NLRB,* 125 F. 2d 311 (CA 7); *NLRB* v. *Ford Motor Co.,* 119 F. 2d 326 (CA 5); *Shell Oil* v. *NLRB,* 196 F. 2d 637 (CA 5); *NLRB* v. *Cleveland Cliffs Iron Co.,* 133 F. 2d 295 (CA 6); *NLRB* v. *Dallas General Drivers, Local*

745, 228 F. 2d 702, (CA 5); *NLRB* v. *Youngstown Mines Corp.,* 123 F. 2d 178 (CA 8); *Joy Silk Mills, Inc.* v. *NLRB,* 185 F. 2d 732 (CADC) cert. den. 341 U.S. 914. The decisions to the contrary (such as *NLRB* v. *United Mine Workers, District 2,* 202 F. 2d 177) are not in point since they involve situations in which the record contained actual evidence from which the danger of future commission of unlawful acts could reasonably be anticipated as to other employers.

3. The Board also exceeded its power in issuing a desistance order which requires the Union to cease and desist from "*in any other manner* restraining or coercing employees" in the exercise of their Section 7 rights (italics supplied). As the Supreme Court pointed out in *NLRB* v. *Express Publishing Co.,* 312 US 426, the authority conferred on the Board to restrain the unfair labor practice which it has found an employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor related to the proven unlawful conduct. The fact that an act has been committed in violation of the statute does not justify a broad order which subjects the union to contempt proceedings if it shall at any future time commit some new violation unlike and unrelated to that with which it was originally charged. "The breadth of an order like the injunction of a court must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past" (*id.* at 436-7).

Here the Board made no finding and there is nothing in the record to suggest that the utilization of a dispatching service which the Board regards as violative of the Act indicates that in the future the Union would engage in all or any of the numerous other unfair labor practices defined by the Act.

Under the principles enunciated by the Supreme Court in the *Express Publishing case, supra,* and *May Department Stores Co.* v. *NLRB,* 326 US 376, we submit that the Board was without authority to order the Union to cease and desist from "in any other manner" restraining employees in the exercise of their Section 7 rights. See also *NLRB* v. *Crompton Highland Mills,* 327 US 217; *NLRB* v. *McGraw Co.,* 206 F. 2d 635 (CA 6).

The propriety of the Board's order, however, should not be analyzed solely from a stark legal standpoint. It is sweeping, technical and punitive in nature with serious adverse implications, from a practical viewpoint, for the Nation's security. Whatever the considerations may be which would justify such an order in a case involving construction projects elsewhere in the United States, such considerations are not pertinent here. The problems of recruitment of qualified manpower to meet urgent defense requirements in remote areas where skilled labor is scarce or nonexistent cannot be solved by the imposition of restrictions which make employer-union cooperation well nigh impossible. It is essential for a full appreciation of what occurred herein for this Court to bear in mind the unusual circumstances under which construction work is performed in Alaska. It is strange, indeed, for the Board to have accorded such significance to the atypical circumstances surrounding the hiring of five college students for temporary summer employment and to have ignored the normal circumstances and difficulties surrounding the employment of qualified experienced construction laborers in Alaska.

This case began with a charge that local natives had been denied employment on White Alice Site No. 2 (Big Mountain) because they were not members of the Union, pursuant to an illegal arrangement with the Company which required it to give preference to Union members. The charge had no merit. Not only were local natives not denied employment or required to become members of

the Union before employment, but even after being hired they were not required to join the Union, even though many did join voluntarily.

The General Counsel dredged up an unusual isolated incident involving the temporary summer employment of five non-experienced college students who were hired in the State of Washington, and the Board selected parts of it as the predicate for finding a general closed shop arrangement between the Union and the Company on open shop projects, and ordered reimbursement of dues and initiation fees to all employees (not only the college students) who had been dispatched by the Union from Anchorage. But while the Board relied upon this isolated atypical incident it failed utterly to consider the peculiar needs of the construction industry in Alaska and the havoc which will be wrought by its blanket order and "disgorgement" remedy if enforced.

Construction is the largest industry in the United States. Building and construction in Alaska is highly, if not completely, organized, and has been for many years past. Its local unions are few, covering vast territories stretching into the Aleutian redoubt, and each represents a pool of skilled, experienced construction workers. Its projects ordinarily arise in remote, virtually inaccessible and uninhabited frontiers and are ordinarily of a highly complex defense nature. Its construction season is of short duration. To its sponsors, ordinarily the Federal Government, and to its contractors it poses prodigious problems of assembling men and equipment on a remote job site on short notice, which involves logistics of transportation, materials and recruiting skilled manpower. The projects involved here were not the usual construction projects, but the building of intricate, highly complex, unique, specialized structures of a nature too secret to unfold in the Record. These projects were urgently needed, without delay, to mesh with the existing defense system upon which the survival of this land could well depend. The govern-

ment expected that the Union would cooperate fully with the Company, at arms length, to facilitate the speedy building of workable intricate facilities. This was their duty. They did no more. The Union's dispatching service performed a vital, almost indispensable function, drawing upon a pool of skilled, experienced workers, on short notice. Simply speaking, there was no other place where the employer could go to recruit qualified workers on short notice. Had the Union in this case denied Wargny, an obviously new personnel man, experienced neither with Alaska nor with qualifications required to fulfill requests from site superintendents, the use of its dispatching service, it is highly reasonable to assume that the projects would neither have been properly nor promptly completed.

As a result of the manner in which a company official may have handled the college students, the Union has been served with a refund order, and a blanket ban whereby any incident anywhere on the part of a Company or Union may subject it to a contempt proceeding.

It can be reasonably anticipated that this and other union hiring halls operating under the peril of this dual "Sword of Damocles" will cease its function as an indispensible component of the system of production for construction in Alaska, serving the national defense and will relegate itself to acting as the bargaining agent for the employees at contract time, representing individual grievances after disputes occur, and collecting dues and initiation fees under checkoff under a union shop provision. While Government Defense Agencies on the one hand, constantly proclaim that the defense outlook is grave, the hour is late and that this emergency requires the closest type of cooperation between labor and management in preventing labor disputes, and in recruiting skilled, experienced workers upon request, the Board applies the ritualistic remedies of disgorgement and blanket bans which can serve no other end but to abort the true responsibilities of the Unions and drive them into hollow mechanistic dues collection agencies and bargaining representatives.

CONCLUSION

The Order of the Board should be set aside.

Respectfully submitted,

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In the United States Court of Appeals for the Ninth Circuit

No. 16383

MORRISON-KNUDSEN COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 16401

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 341, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITIONS TO REVIEW AND SET ASIDE, AND ON CROSS-PETITIONS TO ENFORCE, AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTIONAL STATEMENT

These cases are before the Court upon separate petitions to review and set aside an order (R. 85–92)[1] issued by the National Labor Relations Board on January 29, 1959, against Morrison-Knudsen Com-

[1] References to the printed record are designated "R." References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

pany, Inc., herein called the Company, and International Hod Carriers, Building and Common Laborers Union of America, Local 341, AFL–CIO, herein called the Union or Local 341. In its answers to these petitions, the Board has sought enforcement of its order. The Board's order was issued in a proceeding under Section 10 of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 *et seq.*), herein called the Act.[2] The Board's decision and order are reported at 122 NLRB No. 136. By order of this Court dated April 15, 1959, the cases were consolidated before this Court for purposes of brief and argument. This Court has jurisdiction under Section 10(f) of the Act, the unfair labor practices having been committed in Alaska, within this judicial circuit.

COUNTERSTATEMENT OF THE CASE

I. The Board's findings of fact

Briefly, the Board found that the Company conditioned the hiring of five job applicants upon their joining the Union and obtaining clearance from it. The Board also found that the Company and the Union maintained and participated in an arrangement and practice which required job applicants to obtain from the Union, as a condition of employment, dispatch slips which were issued only after such job applicants had applied for union membership. The Board found that the Company's conduct violated Section 8(a) (3) and (1) of the Act, and

[2] Relevant portions of the Act are printed as an appendix to this brief.

that the Union's conduct violated Section 8(b) (1)(A) and (2). The subsidiary facts upon which the Board based its findings are summarized below.

A. Hiring at the Company's Anchorage office for the White Alice project

During the period here relevant, the Company was engaged on a construction project in Alaska, for the Western Electric Company, referred to in the record as the "White Alice" project or "contract 1787 on C.P.F.F." (cost plus fixed fee) (R. 27–28; 127–128).[3] All new hires for this project were cleared through the Company's personnel office in Anchorage, Alaska (R. 331–332). The Anchorage personnel manager on this project during the period here relevant was Raoul Wargny (R. 58; 129–130). When he assumed this position in March 1956, he discovered that the Company had a general practice of requiring union clearance as a condition of hire (R. 120–121, 162). Both Wargny and District Manager Erickson, who was "complete boss" of all the Company's construction work in Alaska (R. 322), "assumed" that an employee had to join the Union before he could get a dispatch slip (R. 59; 155, 352). Wargny never hired non-union employees (R. 161). According to Wargny's testimony, credited by the Trial Examiner and the Board (R. 58–59), the Company's hiring practice was as follows:

The site superintendent "would radio" that he needed men, giving the job classifications, the number, the date, and the location (R. 58; 121, 157–158).

[3] This was part of a contract referred to in the record as the "Big Mountain" contract (R. 127–128).

If the request did not name any particular individuals whom the superintendent wanted, the Company's personnel office "would call up the unions" and relay the information given by the site superintendent (R. 121). The unions then selected the persons to be referred (R. 145). If the site superintendent requested a particular individual by name, the personnel office first checked the Company files to determine whether his previous work record was satisfactory and whether he was a union member; the latter information was available on the employee's application for work (R. 29; 140–141, 144–145, 398). If the person requested met these qualifications, the personnel office telephoned him and told him that he would have to go to the appropriate union to get a dispatch slip (R. 145–147).[4] The Company's personnel office also "would call up * * * the concerned union" and ask "if the man was in good standing and he was eligible to be dispatched for hiring" (R. 58; 122–123). In either situation, after calling the union, the personnel office would put a notation to that effect on the radio message slip containing the request for men (R. 163–164).

The unions would ordinarily issue a dispatch slip to any individual requested by name if he was "available and in good standing with the unions" (R. 58, 82 n. 2; 145).[5] However, the unions "allowed" the Company

[4] District Manager Erickson testified that the Company relied upon the union to locate such individuals because "the union has generally got a better knowledge of where to locate that employee in a hurry than we do" (R. 325–326).

[5] Notwithstanding Company Personnel Manager Wargny's phrase "good standing with the unions" (R. 145), the Union

to fill only half of its vacancies with individuals requested by it; the unions insisted on unilaterally filling at least half of such vacancies (R. 58; 123). If a union failed to dispatch a requested individual, the Company "would ask for a substitute" (R. 58; 122). If the union gave him a dispatch slip, the Company personnel office "would process him and send him out to the site" (*id.*). The Company insisted on seeing an individual's dispatch slip before hiring him, whether or not he had been requested by name (R. 59; 146, 147). The Company also gave him an employment application form inquiring his union affiliation (R. 29; 140–141, 398). No employee ever reported for work without a dispatch slip (R. 146).

The Company followed the foregoing procedure in obtaining personnel within the work jurisdiction of Local 341—i.e., laborers—as well as other personnel within the jurisdiction of other unions (R. 58; 121–124, 133–135, 159). On several occasions Local 341 refused to issue clearances to individuals whom the Company had requested by name (R. 159–160). Under such circumstances, the Company "would radio the site superintendent and say the man was not * * * available because he wasn't a member of the union or wasn't cleared through the union" (R. 134). Local

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insists (Un. br., pp. 19–20) that he meant "good standing with the Company." However, the testimony on which the Union relies was given in response to the questions, "How do *you* know whether or not they're in good standing * * *? * * * What do *you* mean by good standing?" (emphasis supplied). Wargny answered the latter question, in part, that he meant a man who was eligible for rehire so far as the Company was concerned (R. 146).

341 refused to dispatch at least one individual requested by the Company because he "was not a member of the union and they had so many men on the bench that had priority that they didn't want to accept any more" (R. 59; 159–160).

The record also shows how the foregoing arrangement operated with respect to certain applicants, who, Personnel Manager Wargny testified, "were processed in the regular way" (R. 58–59; 125). To these individual cases we now turn.

B. The hiring arrangement in practice; specific examples

In the spring of 1956, the University of Washington Athletic Department requested the Company to give summer jobs in Alaska to some students or prospective students who were expected to take part in college athletics during the following school year (R. 29; 330, 193, 198–199, 209–210). District Manager Erickson advised both the Athletic Department and District Office Manager Haugen that the Company would hire a certain number of such students (R. 29–30; 330, 382). Haugen in turn notified Harold Groothias, Local 341's business agent, "that these boys would be arriving soon" (R. 34–35; 384). He also telephoned Personnel Manager Wargny that "arrangements were made that [the students] could go down to the union to join the union, Local 341; and as soon as they come in to send them there to get their dispatch slips and come back to the office to be processed and sent out on sites" (R. 153–154, 130–132).

The Athletic Department told four students—Abolins, Crowe, Garnes, and Bleek—to report to District Manager Erickson for work (R. 29–30; 171).

However, when the four students reported to Erickson's office, on June 11, 1956, Erickson was not there (R. 30; 382–383). Accordingly, Erickson's secretary ushered them into the office of District Office Manager Haugen (R. 30; 383). Haugen told the students that he had "expected" them (R. 31, 34; 203). He did not ask them whether they wanted to join the Union, but said flatly that they "would have to join the union before [they] could work" (R. 31–32, 34; 213, 219).[6] Haugen told them that they would have to go through the union hall and then would be dispatched to a job site (R. 30, 34; 172). Haugen then, on his own initiative, telephoned Union Business Agent Groothias that the students were in Haugen's office (R. 31, 34; 385, 392, 172, 188). Groothias replied that he did not want the students to come down to the union hall and that he would like to see them on the Company's premises (R. 35; 385).

When Groothias arrived at the Company's offices, Haugen introduced the students to him (R. 35; 194, 385). Groothias then escorted them to a vacant company office and gave each of them a membership application (R. 35; 173–176, 400). Groothias told them that (R. 59–60; 176, 198, 203–204):

> * * * in order to work [they] would have to join the union and he said that generally it is accepted practice for the individual, when he

[6] This finding is based on the testimony of Garnes, who was credited by the Trial Examiner and the Board. Haugen denied making this statement, with the explanation that such a remark would violate the Act and that if he had made it his superior "would have thrown [him] out of the office bodily. It just wasn't ever mentioned by anyone" (R. 387).

> desires to join the union, to pay the $50 initiation fee at the time he joins. However, he said he was making a special exception in [their] case and he would let [them] go out there owing him money. But he put it very clearly * * * that if [they] did not send the money in within the first or second pay check, he would come out and get [them].

Groothias filled out the application blanks and the students signed them (R. 35; 176, 203). Groothias then gave the students a ride to the Company's employment office, which was some distance away (R. 35; 178, 204, 215).

When the students arrived at the Company's employment office, the Company provided them with job application blanks which included an inquiry as to their union membership (R. 29; 140–141, 215, 398). The students then talked with Personnel Manager Wargny, who told them that when they had obtained their dispatch slips they would be processed for work (R. 35; 154, 215–216). One of Wargny's assistants drove them over to the union hall, where they got their dispatch slips, in duplicate, from Groothias (R. 35; 179, 205, 216). The students then returned to the Company's office, turned in one copy of their dispatch slips to the Company, and received their travel orders (R. 125, 132, 181, 207, 216).

When Employee Abolins arrived at the job site, Job Steward Alukas told him to pay his dues with his first pay check (R. 183). Abolins replied that he had a previous commitment that his first check would go for his fare to Alaska (R. 59–60; 183). Steward

Alukas, who became a company foreman a few months later, then said that Abolins' "first commitment was, of course, the union or they would put [him] out of a job" (R. 59–60; 183–184).[7] Abolins then agreed to pay the Union with his second pay check (R. 59–60; 184). When he received this check, he paid the Union his initiation fee and one year's dues in advance, amounting to $98 (R. 59–60; 177, 401). Other employees likewise paid their fees and dues soon after starting to work (R. 207–208, 217–218, 403).

The day after these employees left for the job site, another athlete, Wyman, came to the Company's office and spoke to either the Company's assistant personnel manager or the Company's assistant project manager (R. 33; 307–309). The Company representative told Wyman that he would be leaving for a job site on the following day and that he would "need" to get a dispatch slip from the Union before he left (R. 33, 60; 309). The Company representative also telephoned the Union that Wyman was going out to Alaska to work and "need[ed] a dispatch slip" (R. 60; 316–317).

Wyman thereupon went to Business Agent Groothias and asked him for a dispatch slip (R. 33–34, 60; 316, 318). Groothias replied, "Well, we will get the dispatch slip for you as soon as we fill out the application" (R. 60; 318). Groothias then gave Wyman a membership application, which Wyman signed

[7] Alukas had made similar statements to employees during the 1955 construction season (R. 297–298, 303).

and returned to Groothias (R. 34; 310–311, 400, 175–176). Wyman told Groothias that he could not afford to pay the initiation fee or the year's dues at that time (R. 312). Groothias replied that when he got on the job he could give his dispatch slip and his fees to the union representative out there (R. 34; 312). When Wyman arrived at the job site, he complied (R. 312).

II. The Board's conclusions

The Board adopted the Trial Examiner's findings, based on the foregoing evidence and to which the Company did not except, that the Company violated Section 8(a) (3) and (1) of the Act by conditioning the employment of Abolins, Crowe, Garnes, Bleek, and Wyman, upon their joining the Union and obtaining clearance from it (R. 81, 37–38). The Board also found that the Company and the Union violated Section 8(a) (3) and (1) and Section 8(b) (2) and (1)(A), respectively, by maintaining, with respect to hirings at Anchorage for the Company's White Alice project, an arrangement and practice of conditioning employment on membership in, and clearance by, the Union (R. 81–82).[8]

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[8] As set forth in detail on pp. 23–26, *infra*, at the conclusion of the General Counsel's case in chief the Trial Examiner granted the Union's motion to dismiss the complaint as to it (R. 320–321). The General Counsel filed exceptions to the portion of the first Intermediate Report reflecting this action (R. 27, 44). Thereafter the Board issued a Decision and Order Remanding Case in which it found that the General Counsel had made out a *prima facie* case with respect to the existence of an unlawful hiring arrangement, and remanded the case to the Trial Examiner in order to give the Union an opportunity to present its case (R. 49–52). However, the

III. The Board's order

The Board's order (R. 85–92) requires the Company to cease and desist from giving effect to any arrangement with the Union or any other labor organization whereby applicants for employment must join such labor organization and obtain clearance or dispatch slips from it as a condition of employment, except in accordance with Section 8(a)(3) of the Act. The order similarly requires the Union to cease and desist from giving effect to any such arrangement with the Company or any other employer, and from causing or attempting to cause the Company or any other employer unlawfully to discriminate against employees. Both the Company and the Union are required to cease and desist from in any other manner coercing employees in the exercise of their statutory rights. Affirmatively, the Company and the Union are required jointly and severally to refund, to all present and former Company employees hired at Anchorage for the White Alice contract, all initiation fees, dues, and other moneys paid to the Union as a condition of membership,[9] and to post appropriate notices.

Union advised the Trial Examiner that it did not wish to present any evidence (R. 53). The Trial Examiner found in his Supplemental Intermediate Report that the Union and the Company were parties to an unlawful hiring arrangement and the Board in substance affirmed the Trial Examiner's finding (R. 62, 81–82).

[9] Liability for reimbursement begins 6 months prior to the date of the filing and service of the charges, and the period between the issuance of the Intermediate Report and the Supplemental Intermediate Report is excluded because of the Trial

SUMMARY OF ARGUMENT

1. The record as a whole clearly supports the Board's finding that the Company and the Union were parties to an arrangement and practice which made union membership and clearance a condition of employment. Petitioners themselves do not deny that if they were parties to such an arrangement the Company violated Section 8(a) (3) and (1) of the Act and the Union violated Section 8(b) (2) and (1)(A).

The existence of such an arrangement is the most obvious explanation for the Company's requirement that the students join the Union and obtain dispatch slips before they were put on the payroll, even though they had come to Alaska in order to work for the Company. That this is the true explanation is confirmed by the fact that the Company always conditioned employment upon union membership and clearance, and the undenied testimony that union representatives told employees that the Union had put them on the job and that the Company would discharge them if they did not join the Union and pay their fees and dues. Furthermore, it appears that every laborer hired through the Anchorage office for the White Alice project was a union member, or applicant for membership, with union clearance.

Finally, the record contains no real evidence, even of a conclusionary nature, which militates against the Board's finding of an unlawful agreement. In fact, a number of petitioners' contentions and the

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Examiner's initial recommendation that the complaint be dismissed insofar as it alleged an illegal agreement.

inferences flowing therefrom in themselves confirm the Board's finding.

2. The Board's order is a proper exercise of its broad discretion in selecting the appropriate remedy for unfair labor practices. A broad cease-and-desist order is warranted by the serious invasion of employees' statutory rights which inheres in petitioners' prolonged closed-shop practices, by the fact that such practices are called for by the Union's policy, and by the fact that the Company has repeatedly participated in unlawful employment practices with respect to other unions and in other areas.

Moreover, the Board's reimbursement order, which requires petitioners to restore to the employees the dues and fees which they paid in order to work, is well adapted to the situation to be redressed, *i.e.*, petitioners' practice of making union membership a condition of employment. Petitioners appear to concede the propriety of such an order generally and, contrary to their contention, the fact that they committed the unfair labor practices while performing defense work does not render the order improper. Moreover, the courts have uniformly approved such orders where, as here, an illegal union-security arrangement has coerced employees into paying for their jobs.

ARGUMENT

A substantial portion of petitioners' briefs proceeds on the assumption that the Board based its unfair labor practice findings and order on the theory set out in *Mountain Pacific Chapter of Associated General Contractors, Inc.*, 119 NLRB 883, remanded, 44 LRRM

2802 (C.A. 9, No. 15966, August 28, 1959). Accordingly, we should like to make it clear at the outset that the Board's conclusions and order are in no way based on the *Mountain Pacific* theory. The Board held in that case that an arrangement under which an employer agrees to obtain all of his employees through a union may be invalid, even though it does not provide in terms that preference will be given to union members. In the instant case, the Board found that the Company and the Union violated the Act by maintaining an arrangement under which the Company, in fact, required all of its laborers to obtain union dispatch slips as a condition of hire, and the Union issued dispatch slips only to members or applicants for membership. As is shown in the cases cited in fn. 10, p. 15, *infra,* both this Court and other Courts of Appeals have uniformly held that such a closed-shop arrangement violates the Act, as, indeed, petitioners concede by implication (Co. br. p. 15, Un. br. p. 25–26). For these reasons, we respectfully request this Court to disregard all contentions in petitioners' briefs which are directed at the Board's *Mountain Pacific* theory or arguments based on the assumption that that theory is an issue in the case at bar.

I. Substantial evidence on the record considered as a whole supports the Board's finding that the Company and the Union, in violation of Section 8(a) (3) and (1) and Section 8(b) (2) and (1)(A), respectively, maintained an arrangement and practice of conditioning employment on membership in, and clearance by, the Union

As noted above, the Board found that the Company and the Union maintained an arrangement and practice under which all laborers hired through the Com-

pany's Anchorage personnel office were required to be union members or to apply for membership, and to obtain clearance from the Union, as a condition of obtaining employment on the Company's White Alice project. It is well settled that by maintaining such an arrangement an employer violates Section 8(a) (3) and (1) of the Act and a union violates Section 8(b) (2) and (1)(A).[10] The record as a whole amply supports the Board's finding that the Company and the Union were parties to such an unlawful arrangement.

A. The evidence establishes the existence of such an arrangement

As set forth on pp. 6–10, *supra,* the Company advised the University of Washington Athletic Department that it would give summer jobs in Alaska to a number of college athletes. The athletes travelled from the State of Washington to Alaska, one of them paying his fare out of borrowed money, in reliance upon the Company's statement to the Athletic Department (R. 170, 183, 200, 212, 307). Nevertheless, when they arrived in Anchorage, the Company's district office manager told four of them that they would have to join the Union, and go through

[10] *N.L.R.B.* v. *Daboll*, 216 F. 2d 143, 145 (C.A. 9), certiorari denied, 348 U.S. 917; *N.L.R.B.* v. *Local 743, United Brotherhood of Carpenters and Joiners of America, A.F.L.*, 202 F. 2d 516, 518 (C.A. 9); *N.L.R.B.* v. *Swinerton*, 202 F. 2d 511, 513–516 (C.A. 9), certiorari denied, 346 U.S. 814; *N.L.R.B.* v. *Philadelphia Iron Works*, 211 F. 2d 937, 943 (C.A. 3); *N.L.R.B.* v. *F. H. McGraw and Company*, 206 F. 2d 635, 638, 639 (C.A. 6); *N.L.R.B.* v. *United Brotherhood of Carpenters and Joiners of America, Local No. 517, AFL*, 230 F. 2d 256, 257, 259 (C.A. 1); *N.L.R.B.* v. *Local 420, United Association of Journeymen and Apprentices of Plumbing and Pipefitting Industry of United States and Canada, AFL*, 239 F. 2d 327, 330 (C.A. 3).

the union hall, before they could work in Alaska (R. 30–31, 34; 213, 219, 172). The Company's assistant personnel manager or assistant project manager told the fifth student that he would "need" to get a dispatch slip from the Union before leaving for the job site (R. 33, 60; 309, 316–317), and as the Company knew, the Union issued dispatch slips only to members or applicants for membership (R. 61; 318, 155, 352, 160, 243). Particularly in view of the Company's moral obligation to hire these students after they had come to Alaska, the most obvious explanation for the Company's requirement that they join the Union and obtain union dispatch slips before they could be hired is, as the Board found, that the Company and the Union were parties to an arrangement which imposed this requirement.[11]

Moreover, the record shows that the Company treated all job applicants as it did the students, regardless of whether or not the Company affirmatively wanted to hire them. Personnel Manager Wargny testified that his office always required union membership and union dispatch slips as a condition of hire, and that the students "were processed in the regular

[11] The Company at no time excepted to the Board's finding that it violated Section 8(a) (3) and (1) of the Act by requiring these students to obtain union membership and clearance as a condition of hire. In fact, the Company admitted in its brief to the Board that "the record contained sufficient evidence to support [the] finding." Accordingly, the Company concedes (Co. br., p. 12) that it may not challenge this finding before this Court. *N.L.R.B.* v. *International Association of Machinists, Lodge 942, AFL–CIO*, 263 F. 2d 796, 798–799 (C.A. 9), and cases cited therein.

way'' (see pp. 3–6, *supra*).[12] Wargny's assistant, who had been trained in the "company policy'' by Wargny's predecessor as personnel manager, testified "* * * we always routed our people through the [union] halls with dispatch slips'' before sending them to the job (R. 223, 233). He further testified that the Company would require an employee to make arrangements to obtain a dispatch slip from the Union even when the Company knew that the employee was delinquent in his dues: "What their arrangements were with the Union, I don't know, I didn't care, except that it was our practice to obtain these men with dispatches'' (R. 226).[13]

Furthermore, the record shows that both union and company representatives believed that the Company owed the Union an obligation to continue its unlawful employment policy. Thus, it is undenied that Business Agent Groothias told some of the students that "in order to work, [they] would have to join the union,"

[12] The basis for the Company's contention (Co. br., pp. 12–13) that the students were treated differently from other applicants itself strongly suggests the existence of a Company-Union hiring arrangement. The Company asserts that it encouraged the students to join the Union "because of the substantial preference in employment they were receiving over the regular source of man power" and because the Company "wanted to avoid friction over the hiring of the students." The Company's expectation that such friction would develop shows that it was conscious that the Union and its members thought that the Company owed them employment preference.

[13] Likewise, Office Manager Haugen, who ran the Company district office which handled the Company's Alaska projects other than the White Alice project, testified that "for some time" the Company had had a "practice" of instructing job applicants to "check through" the appropriate union (R. 384).

and that if they did not pay their fees and dues he "would come out and get" them (R. 59–60; 176). He told another student, "* * * we are putting you people out on the job" (R. 318). The Union's steward told one of the students that "if it hadn't been for [the Union he] wouldn't be out there" and that the Company would discharge him if he did not pay his dues, even though the Company's written contract with the Union did not contain a union-security clause (R. 59–60; 183–184). In addition, Company Personnel Manager Wargny testified that the Company was "allowed" to request by name only one-half of all the employees that it hired (R. 58; 123), and District Manager Erickson testified that a union dispatch slip meant that the Company was "supposed to hire" its owner (R. 326). The close coordination between the Company's and the Union's hiring machinery is demonstrated by the events which occurred before the students began to work for the Company. As set forth in detail on pp. 7–8, *supra*, the Company and the Union transported these students back and forth between their respective offices to enable both parties to perform their respective parts of the hiring process. The effect of petitioners' joint hiring practice was that, so far as the record shows, every single laborer hired through the Anchorage office for the White Alice project was a union member, or applicant for membership, with union clearance.[14] The record as a whole, and particu-

[14] The evidence relied on by the Union in support of its allegations to the contrary (Un. br., pp. 17, 21, 27) merely shows that some employees who were not hired through the Anchorage office, but were hired at the job sites, were nonmembers or had no union dispatch slips. This, of course, in no way reflects on

larly the evidence summarized above, fully warranted the Board's finding that both the Union and the Company participated in an unlawful hiring arrangement and practice requiring union membership and dispatch as a condition of hire. See *N.L.R.B.* v. *Local 743, United Brotherhood of Carpenters and Joiners of America, AFL,* 202 F. 2d 516, 517, 518 (C.A. 9); *N.L.R.B.* v. *Local 369, International Hod Carriers, Building and Common Laborers' Union of America, AFL,* 240 F. 2d 539, 543 (C.A. 3); *N.L.R.B.* v. *United Brotherhood of Carpenters and Joiners of America, Local No. 517, AFL,* 230 F. 2d 256, 258–259 (C.A. 1); *N.L.R.B.* v. *Local 803, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL,* 218 F. 2d 299, 301–302 (C.A. 3).[15]

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the Board's finding with respect to hires through the Anchorage office. The difference in the Company's hiring practice at its Anchorage office and its hiring practice at the job sites may be attributable in part to the fact that the Union apparently maintained no hiring hall at the job sites (see R. 243), in part to the fact that most skilled employees had to be obtained through the Anchorage office (see Co. br., p. 3, and Un. br. p. 16), and in part to the fact that different Company representatives did the hiring at the job sites.

[15] This evidence of the Union's continued and active participation in the Company's hiring processes, and its insistence on obtaining the benefits to it arising therefrom, makes inapplicable here the cases relied upon in the Union's brief (*N.L.R.B.* v. *Thomas Rigging Co.*, 211 F. 2d 153, 157–158 (C.A. 9), employer's petition for certiorari denied, 348 U.S. 871; and *N.L.R.B.* v. *Brotherhood of Painters, Decorators and Paperhangers of America, Carpet, Linoleum Resilient Tile Layers Local Union No. 419*, 242 F. 2d 477, 479–480 (C.A. 10)). In both of these cases the courts found that existence of an employer-union hiring agreement could not be inferred solely from the union's passive acquiescence in the employer's unlawful hir-

B. There is no real evidence which militates against the Board's finding

Virtually all of the evidence summarized above is undisputed. Thus, the testimony by Personnel Manager Wargny and his assistant that the Company required dispatch slips as a condition of hire is corroborated by the experience of the students and stands undenied in the record. Indeed, the Company does not appear to contest before this Court the Board's finding that it followed this practice, which, of course, is sufficient to establish that the Company violated the Act. (*Morrison-Knudsen, Inc.* v. *N.L.R.B.*, 44 LRRM 2680, 2681 (C.A. 9, No. 16301, August 10, 1959). Furthermore, the Union's own argument assumes the propriety of such a finding. The Union takes the position that a dispatch slip in the possession of an applicant for employment serves as a "technique for enabling the Union * * * to know the names of persons being hired * * * by the Company" and as "evidence that the reporting applicant is the man whom the Union has referred in compliance with the Company's request" (Un. br. pp. 15–16). These contentions make sense only on the assumption that the Company would hire only applicants who had union dispatch slips. This is made clear by the testimony of District Manager Erickson that a union dispatch slip is "an indication that that is the man that the union sent to us. If he didn't have a dispatch slip, we would have fourteen guys on our porch every

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ing practice. Moreover, in *Thomas Rigging* none of the employees on the job was a union member or had union clearance. The instant case presents precisely the contrary situation.

morning saying they had been sent by the union and they are the ones we are supposed to take" (R. 326).[16]

Moreover, the Union has never denied, either through witnesses or otherwise, that it issued dispatch slips only to members or applicants for membership; in fact, it requires its members to do "all in [their] power to procure employment for [members] in preference to any and all nonunion men" (R. 400, 176). The Union merely challenges the sufficiency of the record testimony to support this finding. And if the record shows that the Union issued dispatch slips only to members, as we submit it does (R. 318, 155, 352, 160, 243), a violation of the statute is shown even apart from the testimony that union membership was required in terms as a condition of hire.[17]

Finally, the Union has never presented any witnesses to deny that it was in fact a party to the illegal agreement which the Board found. The Union's silence is particularly significant in view of the undenied evidence that Union Business Agent Groothias and Union Steward Alukas told the students that the Union was putting them on the job and that the Company would discharge them if they did not pay their fees and dues (R. 176, 183–184, 198,

[16] Because the Company required all employees to obtain union approval as a condition of hire, petitioners' reliance on *Del E. Webb Construction Co.* v. *N.L.R.B.*, 196 F. 2d 841 (C.A. 8), is misplaced. As the Union concedes (Un. br. p. 26), the Court's conclusion in *Del E. Webb* was based on its finding that the employer was free to hire employees directly, without union approval.

[17] *N.L.R.B.* v. *Swinerton*, 202 F. 2d 511, 513–514 (C.A. 9), certiorari denied, 346 U.S. 814; *N.L.R.B.* v. *Waterfront Employers of Washington*, 211 F. 2d 946, 954 (C.A. 9).

203–204). Although this testimony virtually requires the inference that the Union's own business agent and steward believed that they had a closed-shop and clearance agreement with the Company, neither of them denied making the foregoing statements, even though Groothias, at least, was present during the hearing (R. 317–318). "Under the circumstances of this case their silence rightly is to be deemed strong confirmation of the charges * * *." *Local 167* v. *United States,* 219 U.S. 293, 298.[18]

Notwithstanding this uncontradicted testimony in the record, petitioners contend that the testimony of Personnel Manager Wargny and District Manager Erickson compels a finding that no such arrangement

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[18] The Union contends that the testimony that Groothias made these statements is "contrary to plain common sense." The Union appears to base this attack on its allegation that the students were hired in the continental United States, before they went to Anchorage (Un. br., pp. 14–15). However, the Union's own conduct belies this contention. If the students had been hired in the continental United States, the Company's contract with the Union obligated the Company to reimburse them for the fare to Alaska (G.C. Exh. 5, Art. XIV, Sec. 1(a), omitted from printed record by Court order). However, when Employee Abolins, one of these students, explained to Union Steward Alukas that he would have to pay for his fare to Alaska before he could pay his initiation fee and dues, so far as the record shows, Alukas made no effort to induce the Company to pay Abolins' fare (R. 60; 183–184, 193). Instead, he told Abolins that his "first commitment was, of course, the union or they would put [him] out of a job" (R. 60; 183–184).

While the Company's obligation to reimburse employees for their fare to Alaska was limited to union members, it would not profit petitioners to advance this unlawful exception in an effort to explain away the evidence of its other discrimination against nonmembers.

existed. However, the Company's discriminatory policy antedated Wargny's employment in the Company's personnel office, and Wargny merely testified that he did not know whether there was an agreement to this effect (R. 162, 169, 222–223, 226). Moreover, Erickson's testimony as a whole tends to confirm the Board's finding, for Erickson testified that he "assumed" all employees with dispatch slips to be union members and that a union dispatch slip meant that the Company was "supposed to hire" its owner (R. 326, 352).[19] In any event, the Board was not obligated to credit these witnesses' testimony as interpreted by petitioners, particularly in view of the strong circumstantial evidence to the contrary. *N.L.R.B.* v. *Howell Chevrolet Co.,* 204 F. 2d 79, 86 (C.A. 9), affirmed, 346 U.S. 482.

Indeed, the Union implicitly concedes that the record as a whole is sufficient to support the Board's unfair labor practice findings as to it. This is made clear by the reasons which the Union gives in support of its contention that the Trial Examiner properly granted its motion at the hearing to dismiss the com-

[19] Even if Erickson's testimony is taken as a denial that any closed-shop arrangement existed at the Anchorage personnel office, it would not be persuasive. Such an agreement may well have existed without his knowledge, for according to him two stages of authority intervened between him and the head of that office, and Erickson's own office was about three-quarters of a mile away (R. 352–353, 389). Three Company representatives personally participated in the hiring at the Anchorage office for the White Alice project—Wargny and Brady (whose testimony supports the Board's finding) and Bynum (R. 124). Bynum was not called as a witness, nor is his absence explained.

plaint as to it, at the conclusion of the General Counsel's case-in-chief, for lack of proof. The Union does not suggest, in this connection, that the Trial Examiner could have based his dismissal on any belief that the cold record failed to establish a *prima facie* case. Rather the Union insists that the alleged defect in the General Counsel's *prima facie* case (which the Union did not choose to answer by presenting testimony of its own) could have been attributable only to a belief by the Examiner, at that stage in the proceeding, that Wargny was an incredible witness. We have already established on pp. 15–23, *supra,* that Wargny's testimony is entitled to credence, particularly in view of the many respects in which it was corroborated by other witnesses. However, we should also like to point out that the Union completely misconceives both the basis for Trial Examiner's action in initially dismissing the complaint, and the scope of the Board's action in remanding the proceeding to the Trial Examiner.

In the first place, there is not the slightest suggestion in the record that the Trial Examiner's initial dismissal of the complaint with respect to the Union was in any way based upon doubt as to the credibility of Wargny's testimony. The Examiner stated at the hearing (R. 320–321):

> The only evidence which might tend to tie in the union with the allegations of the complaint is some testimony by Denton R. Moore * * * even if [his testimony] is so, and I am not passing upon that point because I don't think it is necessary, it is only an isolated incident

> and I see no reason to put the union to its proof or its defense. Therefore, each and every allegation of the complaint with respect to the union is hereby dismissed.

The prevailing rule, with respect to the issues presented on a motion to dismiss at the conclusion of the plaintiff's case, casts further doubt on the Union's position. When such a motion is presented, it is the trial court's duty to determine whether, assuming all of the plaintiff's evidence to be true, it has made out a *prima facie* case. In other words, both the motion to dismiss and the ruling thereon assume the credibility of the plaintiff's witnesses.[20] Even if the Trial Examiner's explanation on the record were ambiguous (and we submit it is not), it should be presumed that he followed the prevailing rule.

Moreover, contrary to petitioners' suggestion (Co. br. p. 8, Un. br. pp. 18–19), nothing in the Board's Order of Remand "directed" or "compelled" the Trial Examiner either to reverse his earlier decision or to credit Wargny's testimony. The issues presented to the Board, when the General Counsel filed exceptions to the Trial Examiner's dismissal of the complaint as to the Union, were similar to those presented to an

[20] *Smith* v. *Russell*, 76 F. 2d 91, 93 (C.A. 8), certiorari denied, 296 U.S. 614; *Durham* v. *Warner Elevator Mfg. Co.*, 139 N.E. 2d 10, 14, 166 Oh. St. 31; *Hering* v. *Hilton*, 147 N.E. 2d 311, 314, 12 Ill. 2d 559; *Kingston* v. *McGrath*, 232 F. 2d 495, 497 (C.A. 9); *Churchill* v. *Southern Pacific Co.*, 215 F. 2d 657, 658 (C.A. 9); *Schad* v. *20th Century Fox Film Corp.*, 136 F. 2d 991, 992–994 (C.A. 3); *Merkel* v. *Carter Carburetor Corp.*, 175 F. 2d 323, 325 (C.A. 8); *Bell* v. *Bayly Bros. Inc., of California*, 127 P. 2d 662, 664, 53 Cal. App. 2d 149; *Davis* v. *Curry*, 133 P. 2d 186, 188, 192 Okla. 2.

appellate court when it considers the propriety of a trial court's action in dismissing a complaint at the conclusion of the plaintiff's case. Under such circumstances, the only issue before the appellate court is whether the plaintiff made out a *prima facie* case, and in resolving this question the appellate court does not determine credibility issues.[21] Similarly, in issuing the Order of Remand the Board did not, and perhaps could not, make any final determination as to Wargny's credibility. The Trial Examiner was wholly free to discredit Wargny's testimony in his Supplemental Intermediate Report. Instead, however, he "carefully read" the record, "reread and rechecked" parts of it "several times," and specifically credited Wargny's testimony (R. 58, 59). Accordingly, all the credibility findings herein are entitled to their usual weight (see *N.L.R.B.* v. *Stanislaus Implement Co.*, 226 F. 2d 377, 381 (C.A. 9) and cases cited therein).

II. The Board's order is proper

A. The Board did not abuse its discretion by issuing a broad cease-and-desist order against petitioners

As the Court of Appeals for the Third Circuit stated in *N.L.R.B.* v. *United Mine Workers of America, District 2,* 202 F. 2d 177, 179:

> It is settled that the Board has broad power to determine the necessary scope of its orders and that it is authorized to restrain other viola-

[21] *Schad* v. *20th Century Fox Film Corp.*, 136 F. 2d 991, 992–994 (C.A. 3); *Brewer* v. *Hearne Motor Freight Lines*, 297 P. 2d 1108, 1111, 179 Kan. 732; *Kingston* v. *McGrath*, 232 F. 2d 495, 497 (C.A. 9); *Churchill* v. *Southern Pacific Co.*, 215 F. 2d 657, 658 (C.A. 9); *Schnoor* v. *Meinecke*, 40 N.W. 2d 803, 808, 77 N.D. 96.

> tions of the act, the danger of whose commission in the future is to be anticipated from the course of the respondent's conduct in the past. *N.L.R.B.* v. *Express Pub. Co.,* 1941, 312 U.S. 426 * * *; *May Dept. Stores Co.* v. *N.L.R.B.,* 1945, 326 U.S. 376 * * *; *N.L.R.B.* v. *United Mine Workers,* 6 Cir. 1952, 195 F. 2d 961. * * * It is sufficient if it appears from the nature and extent of the respondents' past conduct that there is real danger that they will commit other unfair labor practices in the future.

Accord: *N.L.R.B.* v. *Sun Tent-Luebbert Co.,* 151 F. 2d 483, 488–489 (C.A. 9). In the case at bar, the Board noted that petitioners' unfair labor practices "demonstrate * * * such a fundamental antipathy to the objectives of the Act as to compel an inference that the commission of other unfair labor practices may be anticipated in the future" (R. 84). Accordingly, the Board required the Union to refrain from coercing the employees of any employer, and both the Company and the Union to refrain from in any manner coercing employees, in the exercise of their statutory rights. Such an order was well within the "broad power" which the statute vests in the Board.

Discrimination against employees for protected activity "goes to the very heart of the Act," *N.L.R.B.* v. *Entwistle Mfg. Co.,* 120 F. 2d 532, 536 (C.A. 4). This was emphasized by Congress when it enacted the 1959 amendments to the Act. These amendments added to the Act, *inter alia,* a provision which requires the Board's Regional Offices to give priority to such

cases.[22] However, as the Board pointed out (R. 84–85), "By conditioning employment on membership in, and clearance by, the Union, the [Company and the Union] have resorted to the most effective means at their disposal to defeat what the Supreme Court has termed the 'principal purpose of the Act,' namely, its guarantee to employees of 'full freedom of association and self-organization.' *Wallace Corp.* v. *N.L.R.B.*, 323 U.S. 248." Thus, for at least 6 months the Company and the Union were parties to an illegal arrangement under which no laborer who applied for work at the Company's Anchorage office for the White Alice project could obtain a job unless he was a union member and had a union dispatch slip. In fact, this arrangement was probably in effect for a considerably longer period, for Personnel Manager Wargny's assistant, who also required all job applicants to obtain union dispatch slips, testified that Wargny's predecessor "train[ed] [him] in the company policy" (R. 222–223, 233).

There can be no doubt that the Union had a policy of seeking to obtain from all employers closed-shop arrangements like the one in the instant case, for the Union required its members to do "all in [their] power to procure employment for [members] in pref-

[22] See P.L. 86–257, 73 Stat. 519, 29 U.S.C., Sec. 161(m). The provision in question states:

"SECTION 10(m). Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of subsection (a)(3) or (b)(2) of Section 8, such charge shall be given priority over all other cases except cases of like character in the office where it is filed or to which it is referred and cases given priority under subsection (1)."

erence to any and all nonunion men" (R. 400, 176). The fact that the Union's unfair labor practices in the instant case constituted "an attempt to implement a settled policy previously announced" rendered eminently proper the framing of the order so as to prevent the Union from in any manner restraining or coercing employees, including employees of employers other than the Company. See *N.L.R.B.* v. *Springfield Building and Construction Trades Council,* 262 F. 2d 494, 498–499 (C.A. 1).[23]

Moreover, the unfair labor practices in the instant case were called for by the Company policy as well. Thus, the evidence in the record strongly suggests that the Company followed a similar practice with respect to hiring for other Alaska projects. The Company's manager for the Alaska district testified that the district had hired 3,000 men with dispatch slips, that the Company "depended upon" the appropriate unions to supply workers, and that a dispatch slip was "an indication that this is the man that the union sent to us, [otherwise] we would have fourteen guys on our porch every morning saying they had been sent by the union and they are the ones we are supposed to take" (R. 326, 355–356); he further assumed that all men supplied by the Union were union members (R. 352). Personnel Manager Warg-

[23] The Union failed specifically to except to the Trial Examiner's recommendation (R. 63) that it cease and desist from engaging in unfair labor practices with respect to employees of other employers. Accordingly, it may not challenge this aspect of the order before this Court. *N.L.R.B.* v. *International Association of Machinists, Lodge 942, AFL–CIO,* 263 F. 2d 796, 798–799 (C.A. 9), and cases cited therein.

ny testified that the Company's Anchorage personnel office required union membership and clearance from all employees hired through its office (see pp. 3–5, *supra*). District Office Manager Haugen testified that he required all applicants for jobs at the Anchorage office to obtain union clearance unless they were former employees specifically requested by a foreman, and all such former employees were union members (R. 392–394). Correspondence in the record shows that during this period the Company required union membership and clearance as a condition of hire from two heavy-duty mechanics within the jurisdiction of the Operating Engineers (R. 395–397, 165–168).

Furthermore, the Company has committed similar unfair labor practices both within and outside the Alaska area. Thus, in *Morrison-Knudsen Co., Inc.*, 123 NLRB No. 12, now on review in the Court of Appeals for the Second Circuit, two joint ventures of which the Company was the sponsor and managing agent participated in an arrangement with an Operating Engineers' local in Massena, New York, under which union clearance was a condition of hire, the union gave preference to its members and to members of sister locals, and nonmembers had to pay permit fees as a condition of obtaining referral. Similarly, in *Morrison-Knudsen Company, Inc.*, 101 NLRB 123, the Company, as manager of a joint venture, discharged an employee in Anchorage, Alaska, because he was not a member of a Plasterers' local. Moreover, in *Morrison-Knudsen, Inc.* v. *N.L.R.B.*, 44 LRRM 2680 (C.A. 9, No. 16301, August 10, 1959), this Court found that the Company violated the Act

by refusing to hire a warehouse clerk for a job near Fresno, California, because he was unable to obtain clearance from a Teamsters' local. The Court there denied enforcement of the Board's broad order on the ground that there was no evidence that the Company had in the past been guilty of any other unfair labor practices, but plainly the circumstances summarized above make this reasoning inapplicable in the case at bar.

Petitioners resist the order largely on the ground that compliance therewith would allegedly jeopardize the speedy construction of defense facilities. However, this Court has held that the Board is particularly justified in entertaining a complaint which alleges an unlawful hiring arrangement, where the employer's activities are vital to the national defense. *N.L.R.B.* v. *Thomas Rigging Co.*, 211 F. 2d 153, 155–156 (C.A. 9), employer's petition for certiorari denied, 348 U.S. 871. Congress took the same view when it enacted the 1959 amendments to the Act.[24] It goes without saying that nothing in the Board's order prohibits lawful hiring arrangements or the lawful operation of hiring halls.

[24] P.L. 86–257, 73 Stat., 519, 29 U.S.C., Sec. 165(c). Section 701 of these amendments adds to Section 14 of the Act a new subsection—subsection (c)—which provides that "the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." As of that date, the Board asserted jurisdiction over all enterprises over which it had statutory jurisdiction and whose operations exerted a substantial impact on the national defense, irrespective of whether the enterprise's operations satisfied any of the Board's other jurisdictional standards. *Ready Mixed Concrete & Materials, Inc.*, 122 NLRB No. 43.

In sum, therefore, the Company's and the Union's serious and prolonged violations of the Act were dictated by their standing policy of seeking to enforce closed-shop conditions; and the Company's unfair labor practices have extended over a number of states, with respect to a number of different unions, and for a prolonged period. These circumstances show that "danger of [the] commission [of unfair labor practices] in the future is to be anticipated from the course of [petitioners'] conduct in the past" (*N.L.R.B.* v. *Express Publishing Co.*, 312 U.S. 426, 437). Under settled authority, therefore, the Board properly exercised its discretion by requiring petitioners to refrain from in any manner coercing employees in the exercise of their statutory rights.

B. The Board did not abuse its discretion by requiring the Company and the Union to reimburse the employees for initiation fees, dues, and other monies paid by them as the price of their employment

Petitioners appear to concede that a reimbursement remedy may be proper in some circumstances. But, they say, reimbursement should not be required in this case because the project is important to national defense. Admittedly, as they point out, it is not easy to secure large numbers of skilled employees in Alaska and cooperation between the Company and the Union is essential. But, the Union seems to imply, such cooperation would be "scotch[ed]" if the same remedy is applied to it "which might serve the purposes of the Act under different circumstances" (Br. pp. 32–33). And in the same vein, the Company asserts that where it is virtually necessary for an employer to use the Union as its source of employees "the risk

of events occurring which are in violation of the Act also increases" (Br. p. 29). In short, petitioners apparently are asserting that the Board should not order the same remedy in cases in which the employer and union who have violated the Act are engaged in defense work that it does when non-defense work is involved. The lack of merit in such a contention is self-evident. Cf. *N.L.R.B.* v. *Thomas Rigging Co.,* 211 F. 2d 153, 155–156 (C.A. 9), employer's petition for certiorari denied, 348 U.S. 871, and the recent amendments to the Act, cited *supra,* p. 31.

Much of petitioners' attack upon the propriety of the reimbursement order is but a restatement of their contention that the record does not support the Board's finding that they were parties to an arrangement which made union membership, or application for membership, a condition of employment. Implicit in this argument is, of course, a recognition that the order is proper if the Board's findings with respect to the arrangement are supported by substantial evidence.

The coercive effect upon employees of such an illegal hiring arrangement is patent. It is difficult to imagine a more potent means of inducing employees into joining or remaining members of a union than to make membership a necessary element in obtaining and retaining employment. This is amply demonstrated in this case, for both Employee Abolins and Employee Crowe testified that they paid dues for the winter months because they wanted to be able to work for the Company during the following summer without having to pay a second initiation fee

(R. 195, 208).[25] In fact, the record shows that the Union's threats of discharge, pursuant to its unlawful hiring arrangement with the Company, impelled the employees to pay their initiation fees, and their dues for months in advance, shortly after being hired and earlier than was convenient for them (R. 183–184, 195, 217–218).[26] However, the Act (with an exception not here applicable) guarantees employees the right to refrain from union membership—and from paying initiation fees, dues, and other monies to a union—without jeopardizing their jobs. *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40–42. Accordingly, the Board properly required the Company and the Union to refund this money.

The propriety of this order is squarely supported by the applicable precedents. The Courts of Appeals have uniformly approved such orders where, as here, an illegal union-security arrangement has compelled employees to pay fees and dues as the price of their jobs. *Dixie Bedding Manufacturing Company* v. *N.L.R.B.*, 268 F. 2d 901, 907 (C.A. 5); *Local Lodge*

[25] Under the statutory provisions in effect at that time, even if the petitioners' contract had contained a union-security clause, the employees could not have been required to join the Union until they had worked for the Company for 30 days, and could not have been discharged for failure to pay dues in advance. *N.L.R.B.* v. *Associated Machines, Inc.*, 239 F. 2d 858 (C.A. 6); *N.L.R.B.* v. *Allied Independent Union, CUA*, 238 F. 2d 120, 121–123 (C.A. 7).

[26] This testimony alone refutes the Union's claim that the order can stand only if it can be shown that none of the employees joined the Union before the illegal arrangement was entered into (Br. p. 33).

No. 1424, International Association of Machinists v. *N.L.R.B.*, 264 F. 2d 575, 582 (C.A.D.C.), certiorari granted, June 22, 1959; *N.L.R.B.* v. *Local 404, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL,* 205 F. 2d 99, 103–104 (C.A. 1); see also *N.L.R.B.* v. *Broderick Wood Products Company,* 261 F. 2d 548, 558–559 (C.A. 10); *N.L.R.B.* v. *General Drivers, Chauffeurs and Helpers Local Union No 886,* 264 F. 2d 21, 23 (C.A. 10).

The rationale underlying such orders is but an extension of the principles set forth in *Virginia Electric and Power Company* v. *N.L.R.B.*, 319 U.S. 533. In the *Virginia Electric* case the Supreme Court approved a Board order which required an employer to refund to its employees the dues which the employer had checked off from their wages pursuant to a closed-shop contract with a company-dominated union. 319 U.S. at 541–544. As the Supreme Court pointed out, such an order "aids in * * * restoring to the employees that truly unfettered freedom of choice which the Act demands," and restores to the employees "that which would not have been taken from them if the Company had not contravened the Act."[27] Similarly here, the reimbursement order will permit the Company's employees to determine for themselves whether or not they wish to join the Union and pay dues and other monies to it, without having to take petitioners' prior unfair labor practices into account, and will re-

[27] In *Virginia Electric* the Supreme Court in effect overruled *Western Union Telegraph Co.* v. *N.L.R.B.*, 113 F. 2d 992 (C.A. 2), relied on by the Company, pp. 26–27 of its brief. See 319 U.S. at 534, fn. 1.

store to them the payments they made in order to get and keep their jobs.

Nor is it essential to show, as a basis for the reimbursement order, that all of the employees paid their dues and fees involuntarily. *Dixie Bedding, supra; General Drivers, supra;* see also *Local Lodge 1424, supra.* While some of the Company's employees may have made such payments voluntarily, the burden would rest upon petitioners as "the tortfeasor[s] to disentangle the consequences" of the closed-shop arrangement, by showing that, even in its absence, dues and fees would nevertheless have been paid; and this they cannot do. *N.L.R.B.* v. *Swinerton, etc.*, 202 F. 2d 511, 515–516 (C.A. 9), certiorari denied, 346 U.S. 814; *N.L.R.B.* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2), certiorari denied, 304 U.S. 576; see also *N.L.R.B.* v. *Wooster Division of Borg-Warner Corporation,* 236 F. 2d 898, 907 (C.A. 6), modified in respects immaterial here, 356 U.S. 342. Thus, evidence that employees may have joined the Union before petitioners entered into their illegal arrangement is immaterial, for the statute prohibits discrimination which encourages employees to *remain* members as well as discrimination which encourages them to become members. *Radio Officers' Union* v. *N.L.R.B.,* 347 U.S. 17, 38, 39–42, 550. The Supreme Court has declared that where the "inherent effect" of union or employer conduct is coercive, not even the subjective evidence of employees to the contrary will avail the wrongdoer.

Radio Officers' Union v. *N.L.R.B.*, 347 U.S. 17, 29, 48–52; *N.L.R.B.* v. *Donnelly Garment Co.*, 330 U.S. 219, 228–231. Accord: *General Drivers, supra.* Nor does it matter that the employees may have received some value for their initiation fees and dues in the form of union services and benefits. *Virginia Electric,* 319 U.S. at 543–544; *General Drivers, supra.* The statute gives employees the right to decide for themselves whether or not to "buy" the benefits of unionism.

But petitioners contend that the reimbursement order is invalid because it is allegedly penal.[28] The Company concedes, however, that a Board order "may be designed to make whole someone who has in fact been deprived of recognized rights, or it may be designed to prevent a violator from benefiting from his misdeeds" (Co. br. p. 27). The order here, we submit, meets both of these tests. The employees are made whole for the payments unlawfully extracted from them as the price of their jobs, and the Union which received these payments is liable, jointly and severally, for their return. Moreover, while the Company did not itself receive the dues and fees, it received substantial pecuniary benefits by shifting to the Union the burden of finding most of its skilled workers (see Co. br. p. 23). The undisputed evidence shows that when a job superintendent on the White Alice project requested the Anchorage office to locate employees, the

[28] Contrary to the Company's suggestion (Co. br. p. 34), liability under the order will cease to accrue when the parties have corrected their unlawful hiring arrangement.

Company always called the Union for laborers unless he had requested particular individuals by name, and frequently even then (pp. 3–6, *supra*).[29] As both petitioners in effect admit (Co. br. pp. 17–18, Un. br. pp. 47–48), the Union's hiring office virtually functioned as the Company's hiring office. Accordingly, the dues and fees which the Company must in part repay were used to pay the Union for operating a hiring office which the Company unlawfully used instead of setting up and financing its own.

Petitioners' contention that the order is nonetheless punitive appears to rest primarily on the ground that they may have to repay a substantial amount of money. The order is intended to remove the effects of the unfair labor practices, and is remedial in nature, and it is not our understanding that the order becomes a penalty merely because the total amount may be large or because the repayment may present problems to the Company and the Union. Indeed, it is our belief that the point was settled in *Virginia Electric,* where the court said (319 U.S. at 544), "The fact that the Board may only have approximated its efforts to make the employees whole * * * does not convert this reimbursement order into the imposition of a penalty." Nor is there any proper basis for inferring, as the Union does from general remarks made by the then General Counsel of the Board (Fenton) and Board Member Fanning, that the Board has treated the reimbursement order as anything but

[29] Similarly, the Company did not even have a personnel manager for its 15-million dollar lump-sum contracts (R. 127–129).

a remedial device. The occasion for the General Counsel's remarks was in connection with an Agency "moratorium" policy on application of such a remedy, which was in effect throughout the greater part of 1958. In the course of these remarks, both the General Counsel and Member Fanning underlined the remedial characteristics of the reimbursement order.

In short, the reimbursement order is similar to other orders which have been uniformly approved by the Courts of Appeals, rests upon principles which have been approved by the Supreme Court, and has the practical effect of requiring petitioners to restore to the employees payments which petitioners have coerced from them and used for their own benefit. The order is well "adapted to the situation which calls for redress" (*N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348) and is therefore entitled to this Court's approval.[30]

[30] The Board issued its reimbursement order in accordance with the General Counsel's exceptions to the Supplemental Intermediate Report, in which the Trial Examiner found that the Company and the Union were parties to an illegal hiring arrangement. Contrary to the Company's contention (Br. pp. 35–36), this order was not barred by the General Counsel's failure to raise the issue in his exceptions to the first Intermediate Report, in which (as we have noted *supra*) the Examiner recommended dismissal of the allegations relating to the agreement. The Board had power to issue the order even absent any exceptions by the General Counsel. *N.L.R.B.* v. *Townsend*, 185 F. 2d 378, 384 (C.A. 9), certiorari denied, 341 U.S. 909; *N.L.R.B.* v. *Oregon Worsted Co.*, 94 F. 2d 671, 672 (C.A. 9); *General Shoe Corporation*, 90 NLRB 1330, 1333, enforced, 192 F. 2d 504 (C.A. 6), certiorari denied, 343 U.S. 904; *Cathey Lumber Co.*, 86 NLBR 157, 158, n. 2, enforced, 185 F. 2d 1021 (C.A. 5), decree set aside on grounds immaterial here, 189 F. 2d 428 (C.A. 5); *The Item Company*, 108 NLRB 1634, 1635, enforced, 220 F. 2d 956 (C.A. 5), certiorari denied, 352 U.S. 917; cf. *N.L.R.B.* v. *Richards*, 265 F. 2d 855, 862 (C.A. 3).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions to review the Board's orders should be denied, and that a decree should issue enforcing the Board's orders in full.

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OCTOBER 1959.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8

(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made; and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9 (f), (g), (h), and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom

membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

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v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition to Review and Set Aside and on Request to Enforce on Order of the National Labor Relations Board

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REPLY BRIEF FOR PETITIONER

I. It is eminently clear from its brief that the Board fully appreciates that unless it can establish, in fact, that the Company and Union operated under an illegal closed shop arrangement, then there exists no sound legal basis for enforcing its order. In its effort to establish the existence of such a proscribed arrangement, the Board's "Counterstatement of the Case" presents "facts" which plainly are not supported by substantial evidence in the record and "facts" which are not based upon any evidence whatsoever in the record.[1] Specifically, for example, the Board's statement of the "facts" is inaccurate in the following respects:

[1] It is of significance to note that Respondent does not assert at any point in its brief that the detailed "Statement of the Case" in Petitioner's brief is inaccurate or inadequate in any respect. Apparently, the Board felt it necessary to make new and additional findings at this time to support its determintion. Thus, the Board's brief arrogates to itself the function of fact finder, credits "favorable" witnesses despite contradictory testimony on their part, ignores "unfavorable" witnesses and credits the testimony of a witness where, and only to the extent, it feels such testimony might lend some support for its inferences. In short, the Board brief would now support its closed shop theory upon a version of the facts fundamentally different from that which the Board found.

1. On page 3, line 10: All new hires for this project were not cleared through the Company's office at Anchorage as witness the testimony of Erickson that "new hires could be picked up at the job location" without clearance (R. 332-333).

2. On page 3, the statement that Erickson "assumed that an employee had to join the Union before he could get a dispatch slip" is inaccurate in that Erickson only "assumed" that "the people that 341 assigns . . . are members of Local 341" (R. 352). The distinction is vital. The Board's misstatement tends to support its closed-shop theory whereas the statement actually made by Erickson does not.

3. The statement on page 3 that "Wargny never hired non-union employees" similarly tends, read alone, to support a "closed-shop" theory but is misleading if not read in the context of his immediately preceding testimony that he was never told that he "couldn't hire non-union people" and that, as a matter of fact he could hire non-union people (R. 161).

4. There is nothing in the cited record references to support the Board's statement on page 4 that "If the site superintendent requested a particular individual by name, the personnel office first checked the Company files to determine whether . . . he was a union member." Indeed, the witness (Wargny) upon whom the Board is relying in this connection, testified flatly that he did not know why a person's union affiliation was on the employment application blank (R. 140).

5. The statements at the bottom of page 4 and top of page 5 that the Company was "allowed to fill only half of its vacancies with individuals requested by it" and "the unions insisted on unilaterally filling at least half of such vacancies" are based solely on Wargny's testimony which, aside from its lack of credibility, hardly provides a substantial basis for such a finding in the light of Brady's testimony that "as to the percentage or the number of named personnel you could request," "there certainly was

nothing ever written or was I ever instructed'' (R. 227), and in view of Erickson's testimony that he had no agreements with the Union other than those contained in the AGC-AFL Alaska Territory Agreement (R. 350-351). As a matter of fact, Brady testified that it was the *Company's policy* not to ''continually ask for every man by name'' because it was not ''fair'' (R. 228).

6. The Board made no finding, as indicated on Page 5, concerning an inquiry on the Company's employment application forms as to union affiliation and it is, accordingly, now improper for the Board to dredge up this ''fact'' to solicit judicial support for a determination which was not predicated in any manner whatsoever on this ''fact''. The Trial Examiner gave ''no consideration as to whether the M-K employment application . . . was violative of the Act for the sole reason that the consolidated complaint raised no such issue'' (R. 29).

7. The Board avers on page 5 that ''no employee ever reported for work without a dispatch slip.'' The record simply does not support such a statement. The cited record reference simply refers to a situation in which Wargny personally contacted a named person and even as to this limited class of personnel there may well have been some (not within Wargny's knowledge) who reported without a dispatch slip (R. 146). And, of course, as the record plainly shows many employees were hired at job sites without any contact whatsoever with the Union.

8. The last two sentences on page 5 of the Board's brief are apparently designed to leave the impression that Union refusal to clear some individuals requested by the Company was predicated upon a lack of union membership. Yet the record is clear that on the alleged ''very few instances'' in which the Union ''refused'' a named request the Union was attempting to secure employment for ''men on the bench that had priority'' (R. 160) or men who were in ''dire need of work, who had been on the bench for a long time'' (R. 227). This certainly does not constitute even any evidence of discrimination, let alone evidence of a closed shop. See

NLRB v. *Turner Construction Co.* 227 F. 2d 498, CA 6. But even under such circumstances, the Company's personnel officer's "job was to keep the site satisfied, so we tried to get the named requests whenever possible" *(ibid)*, from which it may be reasonably referred, the Union's "refusal" was not conclusive. In any event, we submit, there is no substantial evidence to support the view that the Union refused to dispatch any non-union man.

9. The record does not show that the college students, as stated on page 6, "were processed in the regular way". On the contrary, their employment was of such a nature that the treatment accorded them was unusual so as to minimize the possibility of friction between them and local construction workers (R. 203, 206, 318). Indeed, it is strange that Wargny testified that the college students "were processed in the regular way" in view of his testimony that he had nothing to do with processing them but only "sent them to the girls that did the processing." (R. 132)

10. The Board's brief at page 7 states that Haugen "*said flatly* that they 'would have to join the Union' . . ." despite the Trial Examiner's finding that Haugen "*stated, in effect* . . . that they would have to join Local 341 . . ." (Emphasis supplied). We submit that the record does not support the conclusion that Haugen made either a flat or implied statement to that effect. See Petitioner Union's main brief, pages 12-13.

11. On pages 7-8 of the Board's brief, the testimony of Abolins (R. 176) as to what Groothuis said is in direct conflict with Abolins' subsequent testimony that he could not recall any statement by Groothuis about the necessity of joining the Union (R. 194-195). And the earlier testimony of Abolins is not as clear-cut as the Board's brief makes it appear in view of Abolins' concluding phrase, which the Board's brief deletes in its citation, to wit: "or that was the idea I got" (R. 176).

12. The Board's brief at page 12 erroneously states that "the Company always conditioned employment upon Union

membership and clearance." The plain fact is that the Company hired many employees without regard to union membership and clearance as is clearly evident, e.g., from the Board's holding that "We find insufficient basis in the record for holding that the hiring of these 26 was delayed because of their lack of membership in the Union, rather than for the economic reasons testified to by the Company" (R. 83).

13. There is no evidence in the record, we submit, to support the view that the Company did or would discharge employees if they did not join the Union and pay their fees and dues, as the Board's brief intimates on page 12. Moreover, it is significant that the Board can only assert that it "*appears*" that every laborer hired at Anchorage was a union member or applicant and that "the record contains no real evidence . . . which militates against the Board's finding of an unlawful agreement" (Bd. br. p. 12). There is just no evidence that all laborers hired at Anchorage were either members of or applicants in the Union.

14. There is nothing in the record which relates, even remotely, to the petitioners' alleged "prolonged closed-shop practices . . . [and] the fact that such practices are called for by the Union's policy . . ." (Bd. br. 13). The Board made no such findings and, consequently, did not consider or predicate its order upon such alleged "facts".

The foregoing demonstrates that the Board has submitted a statement of facts fundamentally at variance with the record. It would suffice to say of the excursions in the Board brief that "The grounds upon which an administrative order must be judged are those upon which the record discloses its action was based. Findings are essential not only to facilitate judicial review by revealing the factual basis for agency action but also to reflect the 'determination of policy or judgment which the agency alone is authorized to make * * *.' " *NLRB* v. *Capital Transit Co.*, 95 App. D.C. 310, 221 F. 2d. 864, 867. See also, *Carpenters District Council* v. *NLRB*, 44 LRRM 2457, 2458, n. 3 (CADC July 9, 1959); *S. E. C.* v. *Chenery Corp.*, 332 U.S. 194, 196-

197, 318 U.S. 80, 87-88, 94. But the mischief is deeper. For the scope of the excursions in the Board brief is such as to raise the question whether the obligation of the citizen to cut square corners with the Government does not entail the corresponding obligation of the Government to cut square corners with the citizen.

II. We turn now to show that its concept of the law applicable in this case is equally unsound. **FIRST**, the Board attempts to impose upon the petitioner the affirmative duty to disprove or disavow the existence of an illegal arrangement. The Board devotes a large part of its brief to the basic proposition that (Bd. br. p. 21) "the Union has never *denied through witnesses or otherwise,* that it issued dispatch slips only to members or applicants."[2] (Bd. br. p. 21) (For similar statements see Bd. br. pp. 22, 23, 36) (Emphasis supplied).

Under the statute the burden rests with the General Counsel and the Board to prove affirmatively and by substantial evidence the facts which it asserts. See *NLRB* v. *Swinerton,* 202 F. 2d. 511 (CA 9) cert. denied 346 U.S. 814; *NLRB* v. *Thomas Rigging Co.,* 211 F. 2d. 153 (CA 9) cert. denied 348 U.S. 871; *Interlake Iron Corp.* v. *NLRB,* 131 F. 2d. 129 (CA 7); *NLRB* v. *Gottlieb,* (CA 5, 1948) 208 F. 2d. 682; *NLRB* v. *Kaiser Aluminum Corp.* (CA 7, 1950) 217 F. 2d. 366; *NLRB* v. *Amalgamated Local 286,* etc., 222 F. 2d. 95 (CA 7, 1955); "The evidence is upon the Board throughout to prove its allegation, and this burden never shifts." *NLRB* v. *Winter Garden Apts. Projects,* (CA 5, 1958) 238 F. 2d. 138. "The [Respondent] does not enter the fray with the burden of explanation * * * An unlawful purpose is not lightly to be inferred." *NLRB* v. *McGahey* (CA 5, 1956) 233 F. 2d. 406. The Board argues * * * " as though

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[2] The extremity of this position can be gauged by the Board's suggestion that Groothuis who was present at the hearing should have testified (presumably, we must suppose, after the Trial Examiner dismissed the charge against the Union) (Bd. br. p. 22); by the Board's strange complaint that Bynum's (a personnel man for the Company) failure to testify is not explained (Bd. br. p. 23); and by the Board's speculation that the job steward and Business Representative must have believed that the Union had a closed shop (Bd. br. p. 22).

the burden was upon the Respondent to exonerate itself of the charges made against it. The burden, however, was upon the Board * * * affirmatively and by substantial evidence." *(NLRB* v. *Reynolds Intl. Pen Co.,* (CA 7, 1947) 162 F. 2d. 650. Accord: *NLRB* v. *Union Mfg. Co.,* 124 F. 2d. 332; *NLRB* v. *Miami Coca Cola Bottling Co.,* (CA 5, 1953) 222 F. 2d. 341. "Their silence affords no rational basis for inferring" that they are responsible for the alleged wrong of another. *International Ladies Garment Workers Union* v. *NLRB,* 237 F. 2d. 545 (CADC 1956).

SECOND, the Board contends strenuously that petitioner's reference to *Mountain Pacific Chapter of Associated General Contractors, Inc.,* 119 NLRB 883, remanded 44 LRRM 62 (CA 9, No. 15966, Aug. 28, 1959) should be disregarded. (Bd. br. pp. 19-20). Petitioner has clearly demonstrated in its main brief that (1) the invocation of the *Brown Olds* doctrine is an abuse of discretion and punitive because, inter alia, it represents an attempt on the part of the Board and its General Counsel to coerce compliance with the mandatory hiring hall standards enunciated by the Board in its *Mountain Pacific* case and that (2) the Board's theory here of "inherent coercion" is precisely the same per se doctrine as was involved in the *Mountain Pacific* case. In addition, petitioner now relies on this Court's subsequent *Mountain Pacific* decision, because once again squarely before this Court is the basic hiring hall issue. The Board (Bd. br. p. 20) still contends that "the testimony * * * that the Company required dispatch slips as a condition of hire [which] stands undenied in the record * * * is sufficient to establish that the Company violated the Act."[3] Of course, this requirement is not established

[3] The Board's brief asserts that the Union's argument assumes the propriety of the Board's finding that dispatch slips were required as a condition of hire. Just how petitioner could object more vigorously to the Board's findings is hard to fathom. The petitioner does not know what requirements, if any, the Company may have had regarding employment. But, of even greater significance is the total absence in the record of any evidence to establish the existence of any Company requirement that dispatch slips were necessary as a condition of hire. The Union pointed out that Wargny's testimony was incredible, that he

in the record; moreover, as we have pointed out, the dispatch slip plays a vital non-discriminatory role in the operation of a hiring hall and the utilization of dispatch slip in connection with the operation of a hiring hall in not per se violative of the Act. As this Court plainly stated as a reaffirmation of basic law in *Mountain Pacific,* "The hiring hall is legal and has always been held so." Thus, assuming arguendo, that the Company required dispatch slips, such a requirement does not violate the Act.

THIRD, The cases relied upon by the Board as warranting its finding of an unlawful hiring arrangement and practice are simply not in point. (Bd. br. p. 19)[4] In the *Local 743* case, pursuant to an arrangement, *four men were refused employment* because they were not members of the Union and *the Union actually discriminated in favor of members.* In the *Local 369* case, pursuant to an arrangement, *a man was denied employment* because he was not a member of the Union *and the Union refused to accept his membership* application. In the *Local 571* case, closed-shop provisions in the agreement were given effect and a *worker was denied employment* because of an outstanding fine. In the *Local 803* case *an employer* at the Union's behest *accorded priority* in casual hiring *to those who exhibited Union books and non-union workers were "knocked off jobs"* at times on a showing by the Union that paid up members were available or seeking work. Clearly, all four cases involve *actual* discrimination and illegal closed-shop

[4] *NLRB* v. *Local 743, United Brotherhood of Carpenters and Joiners of America, AFL,* 202 F. 2d. 516, (CA 9); *NLRB* v. *Local 369, International Hod Carriers, Building and Common Laborers' Union of America, AFL,* 240 F. 2d. 539, (CA 3); *NLRB* v. *United Brotherhood of Carpenters and Joiners of America, Local No. 517, AFL,* 230 F. 2d. 256, (CA 1); *NLRB* v. *Local 803, International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America, AFL,* 218 F. 2d. 299, (CA 3).

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was not credited by the Trial Examiner, but that even if he had been credited by the Examiner any slight inference which might possibly arise was negated by the record as a whole. To insist that the Trial Examiner was under a duty to consider the *cold* record and disregard the credibility of witnesses entirely misconstrues the functions of a Trial Examiner as a fact finder and elevates form over substance.

or union preferential hiring agreements or arrangements. None of these elements are present in the instant case.

FOURTH, the Board's contention that the cases relied upon by the Union[5] are inapplicable is similarly without merit. The Board contends that the *Thomas Rigging Co.,* and *Painters* cases are distinguishable because of the Union's participation in the Company's hiring process and its insistence on obtaining the benefits to it. (Bd. br. pp. 19, 20, fn. 15) There is no credible evidence in the record to sustain these naked statements. Both cases, we submit, are directly in point.

The Board's effort to distinguish the holding in the *Webb* case (196 F. 2d. 841), is, indeed, remarkable. Here, as in *Webb,* not only was the employer free to hire directly—the Board's assumption to the contrary is in utter disregard of the record—but also whereas in *Webb* there was "no single instance shown of a non-union man applying for a job, either at the site of the project or at the union hall" (196 F. 2d. 846), in the instant case the record plainly shows non-union men applying for, obtaining and retaining jobs at the project site. Thus, the evidence here of an illegal "agreement" or "arrangement" is even more tenuous than it was in the *Webb* case.

FIFTH, the Board attempts, in part,[6] to justify its blun-

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[5] In *Thomas Rigging, supra,* the Union had refused to issue a clearance to non-members. There, the employer had a discriminatory hiring policy. The Court refused to affirm the Board's decision because there was no direct evidence to connect the Union with the Company's unlawful conduct. The Court ruled that the Union had no duty to disavow and could not be held liable on inference or speculation.

In the *NLRB* v. *Brotherhood of Painters, etc.,* case, (242 F. 2d. 477), all but three employees were Union members. The Court found that there was no evidence of negotiation to channel applicants through the Union, that no agreement of any kind relative to hiring existed, and that the *employer was free to employ non-union men at the jobsite or to discontinue, at its pleasure, the use of the Union's facilities for procuring workmen.* The Court, therefore, did find that *any unilateral practice on the part of the employer could not be binding on the Union because neither* the Union nor the employer can be held liable for the unilateral actions of the other. Accord, see *NLRB* v. *International Union of Operating Engineers, Local 12,* 237 F. 2d. 670 (CA 9).

[6] The Board also contends that the Union cannot contest the application of the order "to other employers" because it failed to except to the Trial Exam-

der buss injunctive order by stating that the Union had a well-established "policy" of seeking to obtain from all employers closed shop conditions because union members were obligated "to do all in [their] power to procure employment for [members] in preference to any and all non-union men." (Bd. br. pp. 21, 13, 28, 29).

That a union member can so act within the framework of existing law seems to escape the Board; clearly, the commission of illegal acts cannot be presumed from a mere reading of a statement in an application form for union membership.[7] In any event, the Board's repeated reliance upon this "policy" argument exposes the shallowness and grotesqueness of the Board's position. The allegation concerning this "policy" is contained in paragraph 5 of the complaint (R. 9). No evidence was introduced to support it. The Trial Examiner dismissed the complaint against the Union (R. 27). The General Counsel did not except to the dismissal of paragraph 5. The Board's original decision and order of remand did not consider it, nor did the Trial Examiner in the Supplemental Intermediate Report consider it. The General Counsel again did not except. The Board, as to this point, adopted the Trial Examiner's findings. Now, incredible as it seems, the Board is urging this very allegation, contrary to its own finding, as the major ground in support of its sweeping order.

SIXTH, The Board's brief musters a blend of generalities to support the invocation of the so-called "remedial" refund order. Assuming, arguendo, the existence of a

[7] The pledge attached to an authorization card does not in any manner constitute a policy of 8(b)(2) discrimination. The obligation is not directed to an officer or dispatcher but is merely an oath of fealty (administered to all members of all Local Unions by virtue of a Uniform Constitution of Local Unions) running to the individual member and binding in spirit. Clearly, however, this moral obligation which an individual member as such has a right to fulfill is limited by his legal obligations. Officers of the Union, including dispatchers, take a separate oath, which in no way includes any preferential provision. Finally, the very fact that many non-union employees were hired, in this case, negates the notion of a closed-shop policy of the Union.

iner's recommendaion (Bd. br. p. 20, fn. 23). This contention lacks merit. The Union did specifically except to the recommended order (R. 74).

closed-shop arrangement, we respectfully submit that there is no substantial evidence in the record to support a conclusion that any employee joined the Union involuntarily.[8] Again, the record is replete to the contrary. The Union is both the legally *recognized* and chosen representative of Morrison-Knudsen's employees, and its membership is and has been composed for many years of virtually all construction laborers within its jurisdiction. We do not contest the Board's power to draw "reasonable inferences from proven facts." *Radio Officers Union* v. *NLRB,* 347 U.S. 17, 49. At the same time we consider it beyond cavil that the Board cannot indulge in "mere conjectures" or "extravagant and unwarranted assumption." *Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 238. Board inferences are to be "reasonable" as the Court stated eight separate times in four pages in *Radio Officers,* supra, 347 U.S. at 49, 52.

The Board's reliance upon the *Virginia Electric* decision (319 U.S. 533) is misplaced—that case presents a far different situation. There, the Company initiated and thereafter dominated a company union to thwart a national union, "negotiated" a closed shop and compulsory check-off arrangement to entrench it and insure its financial stability and contributed financial and other support to it. The Union was not the result of free choice by the majority of employees. Employees who failed to join were discharged. It was declared void from its *inception* and ordered disestablished because this company creature could never truly represent the interests of the employees. The controlling charactristics were *interference with the selection of a bona-fide statutory bargaining representative* and a *company established and dominated Union,*[9] "a type

[8] The Board's argument to the contrary that two employees paid their dues in advance is specious. There is no testimony that they were required to pay their dues in advance. Many Union members do. Innumerable reasons may have motivated them, including the fact that if they rejoined the Union the following year it would have cost more money, or because they wanted to pay their dues while they had the money.

[9] In the initial years of the Wagner Act, the Board was faced with a series of cases, of which *NLRB* v. *Pennsylvania Greyhound Lines,* 303 U.S. 261, 269 (1937) was representative, where employers set up company dominated unions

of organization", as expressly noted by the Supreme Court, "which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest." 319 U.S. at 544.[10] Moreover, Justice Frankfurter concurring in *Virginia Electric* underscored the need for evidence of coercive payments in order to support the refund order.

The other cases cited by the Board (Bd. br. pp. 34, 35) are also clearly distinguishable. *Dixie Bedding Manufacturing Co.* v. *NLRB,* 268 F. 2d. 901 (CA 5) involved a situation where a Company, faced with the prospect of organizational activity by two unions, illegally recognized one, a minority union, expressly in return for "better terms" and signed an illegal union security agreement, and thereafter paid the initiation fees and dues of its employees rather than grant a wage increase. In *Local Lodge 1424, IAM* v. *NLRB,* 264 F. 2d. 575, cert. granted June 22, 1959, the Company extended recognition to a Union which did not represent a majority of workers, at a time when another Union was engaged in organizational activities, and signed a union-security and check-off agreement. *NLRB* v. *Local 404, IBT,* 205 F. 2d. 99 (CA 1), involved a situation where a union shop provision which applied to one plant was illegally applied to another plant, whose employees were represented by another union at the time when a self-

[10] Labor history, as Congress and the Court had recognized, was replete with the shortcomings of company unions, with their impotence in times of stress and with their frequent betrayals of their members' interest. See Millis and Montgomery, the Economics of Labor; Organized Labor, Vol. III, pp. 879, 886 (1945); Dulles, Labor in America, pp. 261, 277 (1949). Contrast this representation with the well known fact that the Local here has established the highest wages, working conditions, and benefits for construction laborers in America. Construction Labor Report 1959-1960 Wage Rate Guide, BNA, October 28, 1959.

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and bore all the expense, because they felt that frustration of employee desires warranted this outlay. When this device was outlawed, more sophisticated stratagems were then adopted, e.g. to establish a company union, recognize it, and then enter into a closed-shop, check-off contract as in the *Virginia Electric Power* case. But, in all such cases, "a dominated union is deemed *inherently incapable* of representing its members." *NLRB* v. *Pennsylvania Greyhound Lines,* ibid, at 270 (emphasis supplied).

determination election was pending and approximately 40 employees signed up specifically "under protest." In addition to non-majority status and the pendency of an election, there was clear evidence of actual coercion. In *NLRB* v. *Broderick Wood Products Co.,* 261 F. 2d. 548 (CA 10) the situation was virtually identical to the *Local 404* case, supra, and included many actual discharges. Thus, in all these cases the Union was not the freely chosen majority representative and specific acts of coercion including discharge or threat thereof occurred. In such cases there may conceivably be some basis for a rebuttable presumption of involuntary action by employees in joining a Union.

The remaining case cited by the Board, namely *NLRB* v. *General Drivers Local 886,* 264 F. 2d. 21, sustains, we submit, petitioner's position rather than the Board's. In that case none of the employees were members of the Union and enjoyment of contractual benefits to which they were otherwise entitled was expressly conditioned upon joining the Union and authorizing a check-off of dues. Thus, in that case, the Tenth Circuit clearly sustained the Board because there was a concrete showing that Union conduct had compelled involuntary employee action. It is equally clear that the Board's order in that case neither rested upon, nor was sustained by, a theory that there was an irrebuttable presumption of coercion. Here, there has been no showing made by the Board that persons involuntarily joined the Union or were denied negotiated contractual benefits to which they were entitled. Indeed, under the Board's theory here no such showing need be made, and even more significantly, the Union is precluded from showing to the contrary.

The short of the matter is that only one premise could support the Board's theory that all dues and fees collected during the course of an illegal hiring hall arrangement amount to coerced payments even when directly collected by a free, vigorous, traditional and militant bargaining representative not dominated or assisted by any employer.

That false—even insulting—premise, which the Board has never seen fit to articulate, is simply this: No working man would join a labor union and pay dues to it unless he was compelled to do so by a union security arrangement.

To buttress this "extravagant and unwarranted assumption," the Board has not deigned to cite a single historical study or a single economic survey.[11] It is simply not the fact that a vague abstraction called a "union" coerces employees into membership. Working men have traditoinally banded together as free citizens and sought to prevent competition from cheap, substandard labor by means of the union shop or some other analogous method. The experience of a hundred years attest this. Commons, supra, Vol. 1, pp. 596-600.[12]

In the light of the historical experience and the Board's own experience with the union security elections (see Pet.'s br. pp. 35-36), the inescapable conclusion is that the overwhelming majority of workers freely represented by unions voluntarily embrace union conditions, and any other inference, we submit, is patently "unreasonable" within the meaning of the *Radio Officers* decision, supra.

The full dimensions of the *Brown-Olds* doctrine now stand revealed. Upon an *a priori* proposition that workers would not join unions and pay dues but for the existence of union-security arrangements, a proposition plainly at variance with history, recent empirical data squarely in point, and with the record,[13] the Board has erected a doc-

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[11] On workers' motives for joining unions, see Commons and Associates, History of Labor in the United States, Vol. 1, pp. 169-184, 575-576 (1918), Vol. II, pp. 43-48, 301-306 (1918), Vol. IV pp. 621-630 (1935); *AFL in the Time of Gompers*, Taft, (1957) pp. 1-13.

[12] Union hiring halls in the building and construction industry were established and are maintained by building craftsmen banded together, as the best means to decasualize employment, avoid long and continuous searches for intermittent employment and to assure working under uniform wage, hour and working conditions. Union operated hiring halls manifest the uncoerced desire and will of the employees.

[13] See, for example, Wyman's testimony as set forth on page 13 of Petitioner's main brief. Another college student, Crowe, testified "I figured the reason we were going to get this three forty an hour was because the Union had set up those standards. I had no objection to joining." (R. 211-212).

trine of "inevitable coercion" of dues payments, and it has sufficiently insulated its jerry-built structure from any contact with reality by refusing even to consider evidence which would contradict factually the conclusions which it has reached through unreasonable inferences.[14]

The Board in support of its "inherent coercion" doctrine states that even subjective evidence of employees to the contrary will not avail and cites in support thereof *Radio Officers,* supra, and *NLRB* v. *Donnelly Garment Co.*, 330 U.S. 219, which, when fairly considered, refute rather than support the Board's contentions.

In *Donnelly Garment,* the Board had been instructed by a Court of Appeals to admit and consider testimony by a company's employees that they had voluntarily organized and joined a union which the Board had charged was company-dominated. After a painstaking examination, the Court concluded that the Board had in fact obeyed the mandate of the Court of Appeals, even though the Board still remained convinced that the Union was company

[14] As the Board bluntly argues at p. 36 of its brief, its doctrine of inevitable coercion precludes disproof. The Board has taken this position not only in theory but in practice. In *United States Steel Corp. (American Bridge Division),* 122 NLRB 155 (1959), the Board applied the compulsory reimbursement remedy against a Union despite the fact that it was never sought by the General Counsel at any stage of the proceeding and despite the Trial Examiner's Intermedite Report which was favorable to the Union. The Union, on April 3, 1959, filed a motion to reopen the proceedings "to receive evidence as to employees who voluntarily paid initiation fees and dues to the Union during the period in question and were not in fact required to do so to secure or retain employment with Respondent Company." On May 4, 1959, the Board's Executive Secretary entered an order for the Board denying the union's motion "on the ground that nothing has been presented that was not previously considered by the Board."

The final and inevitable step in this perversion of logic was taken by a Trial Examiner, in *Lummus Corp.,* NLRB case No. 4-CB-384 in an Intermediate Report filed on August 10, 1959. Faced with the threat of a *Brown-Olds* order, the Union had made an offer of proof at the hearing through the form of testimony of members and financial statements, to "establish that union members were not *coerced* by the unlawful contract but instead paid dues and other fees to the Local voluntarily. . . ." (Mimeo. copy p. 8). Citing *Nassau and Suffolk Contractors Ass'n., Inc.,* 123 NLRB No. 167, 44 LRRM 1138, 1139 (1959) and *Saltsman Construction Co.,* 123 NLRB No. 142, 44 LRRM 1085, 1086 (1959) for the proposition that "an unlawful exclusive hiring contract *inevitably* coerces employees," the Trial Examiner rejected the proffered evidence. *Ibid* (Emphasis in the original).

dominated. At no point did the Court suggest that "subjective evidence" was not a factor. Indeed, it expressly noted that it was "not called upon to lay down a general rule of materiality, regarding such testimony." 330 U.S. at 231.

Radio Officers, we grant, upholds the power of the Board to draw "reasonable inferences from proven facts" without the necessity in every instance of having "subjective evidence of employee response." 347 U.S. at 49, 51. But nowhere is there any indication that the Board is authorized to draw an inference in splendid disregard of proven facts. Nowhere is there any indication that the Board may make such an inference irrebuttable by refusing to consider proffered testimony in contradiction of it. Especially pertinent on this point are the words of Justice Frankfurter, concurring in *Radio Officers* in an opinion in which he was joined by Justices Burton and Minton.

> "But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board *must* take into consideration. The Board's task is to weigh *everything* before it, including those inferences which, with its specialized experience it believes can fairly be drawn." 347 U.S. at 56-57. (Emphasis supplied.)

We did not think that the Board could or would deny that the primary purpose for employing the *Brown-Olds* remedy, as demonstrated in Petitioner's main brief, is to enforce adherence to the three standards enunciated in its *Mountain Pacific* decision, 119 NLRB 883 (1958). This Court, however, refused to enforce the Board's order in *Mountain Pacific,* declaring it "patent that a contract which is fair on its face is not unlawful in and of itself simply because it does not contain clauses prohibitory of illegal action." *NLRB* v. *Mountain Pacific Chapter, et al.*, (CA 9, 1959) No. 15, 966, 44 LRRM 2802, 2806. This Court, in effect, thus has indicated its disapproval of the primary factor which motivated the Board in applying the *Brown-Olds* remedy in this case. Significantly it struck down the

Board's attempt to operate on the same basis on which it is here trying to operate, viz. on the basis of per se doctrines rather than reasonable inferences of fact. That the utilization of this so-called remedy is arbitrary and capricious may perhaps be best illustrated by the statement of a Board Trial Examiner, who, while reluctantly applying the remedy recently, characterized it in the following manner:

> "*Brown-Olds is a meat-axe remedy applied in a meat-axe fashion* * * * inequities are inherent in applying *Brown-Olds*. One of these is that it is left to the charging party to determine whether all or only one or more of equally guilty, contracting parties will be held liable for reimbursement." [15] (Emphasis supplied.)

Significantly, the mechanistic application of the *Brown-Olds* remedy reflects the Board's failure to take any account of the legality of a union shop under the proviso to Section 8(a)(3) of the National Labor Relations Act. Under this proviso, in all States not having "right-to-work-laws", a legitimate collective bargaining representative can enter into an agreement with an employer requiring union membership, as a condition of employment, after the thirtieth day following the beginning of employment. Accordingly, even assuming arguendo that some employees may have been coerced into joining a union involuntarily by a closed-shop arrangement, the Union "[at] most may have collected only one month's dues in excess of those to which it was equitably entitled."[16] So far as the men on the job are concerned—and these are the only ones covered by the refund order—this is realistically the sole injurious

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[15] *Ingalls Steel Construction Co.*, NLRB Case No. 15-CA-1174 (1959). Intermediate Report, Mimeo copy p. 10.

[16] Board Member Petersen, dissenting in *Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594, 607 (1956). If no union shop or no union at all (as this Board's logic would lead one to believe) is what the employees want, deauthorization or decertification petitions are always available. See para. 9(c) and (e) of the National Labor Relations Act as amended, 61 Stat. 144-145, 29 U.S.C. para. 159 (C)(e); H.R. rep. No. 245, 80th Cong. 1st Sess. p. 25.

effect of a closed-shop arrangement.[17] The Board utterly refuses to face up to this fact despite the Supreme Court's admonition that "only actual losses should be made good." *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 198.

SEVENTH. The Board's reply to the petitioner's contention that the unique *circumstances* and factors surrounding the construction of the projects in this case and in Alaska in general should have been taken into consideration by the Board in formulating an appropriate remedy is a complete non-sequitur. That Congress in the 1959 amendments to the Act specifically required the Board to assert jurisdiction over labor disputes affecting the National Defense is simply no answer to petitioner's contention. Petitioner never suggested, let alone stated, that the Board should refuse to assert jurisdiction over National Defense projects. The Petitioner, in part, stated that the Board should have been aware of the National Defense Effort and given due regard to the problems therein involved and to the effect its proposed "remedy" would have on this vital undertaking before applying a mechanistic remedy. Board orders cannot be applied "mechanically." They must take "fair account * * * of every socially desirable factor in the final judgment." *Phelps-Dodge Corp.* v. *NLRB,* 313 U.S. 177, 198.

Indeed, the 1959 amendments underscore the validity of the position of the petitioner. Congress passed a specific amendment[18] which recognized the uniqueness of the building and construction industry and specifically legalized, for

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[17] In the recently enacted Labor Management Reporting and Disclosure Act Congress took recognition of the *unusual employment practices* in the construction industry and inserted a provision permitting unions and employers engaged "primarily in the building and construction industry" to enter into a contract, even though the majority status of the Union had not been established under Sect. 9 of the Act prior to the making of the agreement, which requires membership in the Union as a condition of employment after the *seventh* day following employment or the effective date of the agreement, whichever is later. (Sec. 705(a) Labor Management Reporting and Disclosure Act.)

[18] The amendment originated in the Senate Labor Committee and was enacted into law in the exact language approved by the Committee, 29 U.S.C. 158, 73 Stat. 545. See Appendix, p. 21.

that industry, pre-hire agreements, seven-day union shops, first opportunity clauses requiring employers to notify the Union of vacancies and to give it an opportunity to refer qualified applicants and Union operated exclusive hiring halls. While this amendment may raise an issue of "mootness", at the very least it suggests that Congress is in violent disagreement with the Board. Congress has recognized and specifically acted upon those factors which the Board here states are of no import. The Senate Labor Committee after first analyzing the uniqueness of the industry, stated:[19]

> "During the Wagner Act period, the National Labor Relations Board declined to exercise jurisdiction over the industry not only because of these *complexities,* but also because the industry was *substantially organized* and hence *had no need of the protection afforded* by the Act. *Concepts evoked by the Board therefore developed without reference to the construction industry.* In 1947, after passage of the Taft-Hartley amendments, the Board applied the provisions of the Act to the building and construction industry.
>
> "That the application of the Act to the construction industry has given rise to serious problems is attested by [a long list of citations, including numerous Hearings, Reports, and Presidential messages] in which the difficulties of the industry are set forth in detail. * * * The bill endeavors to resolve certain urgent problems." (Emphasis supplied.)

The Committee's report analyzed the characteristics of this industry, outlined the dynamic economic reasons why employers utilize union operated hiring halls in the industry and found that *"a substantial majority of the skilled employees in this industry constitute a pool centered about their appropriate craft union."* (Emphasis supplied.)[20]

We have shown in our main brief that the compulsory reimbursement remedy was extended, per se, to the construction industry to coerce it to comply fully, in writing, with the standards enunciated in the Board's *Mountain Pacific* decision, which this Court has refused to enforce.

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[19] Senate Rep. No. 187, 86th Cong., 1st Sess. p. 27.

[20] *Id.* at p. 28.

Here, the Board has retroactively applied this "remedy" to a case which arose prior to the enunciation of the *Mountain Pacific* standards even though both the employer and Union have complied voluntarily with these standards.

Respectfully submitted,

GORDON HARTLIEB

VINCENT F. MORREALE

ROBERT J. CONNERTON

Of Counsel:

JOSEPH M. STONE
November, 1959

APPENDIX

Building and Construction Industry

Sec. 705 (a) Section 8 of the National Labor Relations Act, as amended by section 704(b) of this Act, is amended by adding at the end thereof the following new subsection:

"(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further:* That any agreement which would be invalid, but for clause (1) of this subsection shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

16383

No. ~~16385~~ and No. 16401

United States Court of Appeals

For the Ninth Circuit

No. 16383

MORRISON-KNUDSEN COMPANY, INC., *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

No. 16401

INTERNATIONAL HOD CARRIERS, BUILDING AND COMMON LABORERS UNION OF AMERICA, LOCAL 341, AFL-CIO, *Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION BY MORRISON-KNUDSEN COMPANY, INC., TO REVIEW DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, AND PETITION BY THE NATIONAL LABOR RELATIONS BOARD TO ENFORCE SAID ORDER AGAINST MORRISON-KNUDSEN COMPANY, INC.

REPLY BRIEF OF MORRISON-KNUDSEN COMPANY, INC., PETITIONER

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REPLY BRIEF OF MORRISON-KNUDSEN COMPANY, INC., PETITIONER

1. RECENT DEVELOPMENTS

Since the preparation of this petitioner's initial brief, there have been two significant developments which have substantially disposed of the conflict between Board decisions and Court decisions as to the criteria of legality applicable to Union hiring halls, and these developments have further rendered moot

the policy considerations which had apparently motivated the Board in its efforts to prescribe the conditions of utilization of such hiring halls.

The first development was the decision of the above court in *N.L.R.B. v. Mountain Pacific Chapter of the Associated General Contractors, Inc.* (No. 15966, decided August 28, 1959). In that case the Board had held that the mere utilization of an exclusive hiring hall necessarily encouraged Union membership in an illegal manner, unless certain so-called safeguard provisions were contained in the contract under which the hall was operated. This contention we submit is substantially identical to the contention made in the present case that the mere practice of employees being dispatched through the Union having jurisdiction over their work, even if such employees are not hired from the Union hiring hall, necessarily encourages Union membership in an illegal manner.[1]

It has always been the employer's position that the utilization of a dispatch system as in the present case was not in itself illegal nor did it constitute illegal encouragement of union membership by discrimination. This Court in its opinion in the *Mountain Pacific* case clearly held that the mere utilization of an exclusive Union hiring hall could not be deemed *per se* illegal, nor could it even be used as *prima facie* evidence of an illegal hiring hall in retrospect.

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[1] In the General Counsel's Brief, the phrase "union membership and union clearance" is used in the conjunctive as a description of alleged illegal conduct over thirty-seven times. It has been the General Counsel's position that the requirement of union dispatch is the equivalent of the requirement of union membership.

By the same token in the present case, the mere practice of having employees dispatched through the Union hall, even though some employees are not originally hired from the hall, is not illegal. As reiterated in the *Mountain Pacific* case, the adoption of a system of Union referral or clearance does not in itself violate the act. Therefore, the continuous reference by General Counsel to the existence of a dispatch or clearance system in the Anchorage area between the Union and the employer in the present case is a reference to a practice which does not have legal significance. The reason the General Counsel contends that a system of Union dispatch or clearance is equivalent to requiring Union membership is that the system of dispatch is clearly established by the record, and in fact not denied by the parties, whereas there is no substantial evidence of a practice of discrimination because of membership or non-membership in a Union.

The second significant development is the adoption in the Labor-Management Reporting Act of 1959 of statutory recognition of the peculiar problems of the construction industry. The applicable portions of this Section are as follows:

> SEC. 705:
>
> "(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are

members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, That nothing in this subsection shall set aside the final proviso to Section 8(a)(3) of this Act: Provided further, That any agreement which would be invalid but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)."

By spelling out the permissible conditions which may be included in the utilization of a hiring hall, Congress has largely eliminated the speculation and uncertainty which had arisen in this area. There is no further necessity for the Board to attempt to impose its own criteria. It is significant, as will be later discussed in this brief, that under any view of the facts in the present case, they would not be in violation of the

present Act above quoted. Although this might not technically be a defense to a past violation, it certainly has a strong bearing on the appropriateness of the remedy.

II. EXCEPTIONS TO BOARD COUNTER-STATEMENT

Although this petitioner has already discussed in its initial brief many of the issues to which it now takes exception in the Board's brief, clarification of the issues and evidence requires a point by point analysis of the Board's Statement of the Case.

1. The Board points out (P. 3) that Raoul Wargny, an employee of only six months' duration with petitioner who was unvoluntarily discharged, discovered that the company had a general practice of requiring Union clearance as a condition of hire. However, the testimony referred to on Transcript Page 162 consists of a leading question by the Board Counsel merely to the effect that a general practice to clear through the Union was discovered, with no reference to such clearance being conditional. Furthermore, as previously discussed, a system of such clearance is not illegal. *N.L.R.B. v. Mountain Pacific, supra,* and cases therein cited.

2. Reference is next made (P. 3) to testimony that Wargny assumed that Union membership was a condition of dispatch, and Aner Erickson, Project Manager, assumed that Local 341 dispatches were Union members. The testimony of Mr. Wargny that he assumed that Union membership was a condition of dispatch (appearing on Page 155) is the *only* testimony in

the record directly relating, as a general practice, a requirement of Union membership to obtaining dispatch through the Union. Although it is urged in the brief and in the various orders that this testimony is "credited," it is obvious that such testimony cannot be substantial evidence because it is by its own admission not based on personal knowledge or any knowledge whatsoever. It is not even hearsay, but merely personal conjecture, speculation and assumption. Such testimony is not sufficient even to support a jury verdict, and falls far short of the substantial evidence test of Section 10(f) of the Act, 29 U.S.C.A. Section 160, *Universal Camera Corporation v. National Labor Relations Board* (1951) 340 U.S. 474, 95 L.ed. 456; *Controller of California v. Lockwood* (C.A. 9, 1951) 193 F.(2d) 169; *Moore v. Chesapeake & Ohio Railway Company,* 340 U.S. 573, 95 L.ed. 547.

3. The statement is next made (P. 3) that Wargny never hired non-Union employees (Tr. 161); the inference is that he either could not or would not hire non-Union employees. A reading of the entire testimony referred to shows that no such inference was intended or could be made:

> "Q. Did anybody, Mr. Wargny, that was over you in your job with M-K ever tell you that you couldn't hire nonunion people?
>
> A. No, sir. [52]
>
> Q. As a matter of fact, could you hire nonunion people? A. Yes, sir.
>
> Q. And as a matter of fact, did you ever hire nonunion people? A. No, sir.

Q. Did anybody from Local 341 ever, by either direct words or inference, threaten any repercussions if you hired nonunion people?

A. Not that I recall."

Mr. Wargny further testified as the Board's witness as follows:

"Q. (By Mr. Hartlieb): Mr. Wargny, while you were personnel manager for M-K, were you ever told or were you aware of any agreement between (sic.) M-K and the union to the effect that only union men would be hired and that the company would use the union hall as its sole source of recruitment for labor? A. No, sir.

Q. You knew of no such agreement, neither oral or tacit? A. No, sir."

Reference is made throughout the Board's brief to crediting Mr. Wargny's testimony, but it is not made clear which part of his frequently conflicting testimony is credited. Although emphasis is placed on Mr. Wargny's testimony that requested employees would be dispatched by the Union if they were available and in "good standing," the only testimony describing good standing refers to good standing with the company and not the Union (Tr. 146).

It is apparent that a practice of Union clearance or dispatch developed because the Union supplied the overwhelming majority of men to the various construction jobs. It is further apparent that Mr. Wargny was familiar with the Union dispatch system, but had no knowledge whatsoever as to whether Union membership in fact was a condition of dispatch. Although the hearings in this case lasted for a week in Anchorage alone,

and although the General Counsel called fifteen witnesses, he failed to produce one witness who had been denied a dispatch because he did not belong to the Union. Mr. Wargny further testified that no prospective employee ever appeared for employment who did not have a dispatch slip (Tr. 146).

4. An example of the Board's attempt to relate unrelated circumstances is contained in the bottom of Page 5 of the Board's brief. The contention is there made by the Board that on several occasions Local 341 refused to issue clearances and under such circumstances the company would radio that the man was not available because he wasn't a member of the Union. However, the witness stated there were not more than three cases in which the Union refused to send a man requested (without reference as to why), and the only case in which the witness did recall the reason, it involved a question of priority (Tr. 160). We submit that this vaguely recalled instance involving one employee cannot support a finding that Union membership was a condition of obtaining dispatch from the Union involved. Yet, based on not more than this testimony, the Board requests the above court to enforce an order requiring reimbursement of thousands of dollars in order to implement the Board policy which is already obsolete.

We believe the discussion of the above court in the case of *N.L.R.B. v. International Union of Operating Engineers, Local 12* (C.A. 9, 1956) 237 F.(2d) 670, at page 674, is particularly applicable to the present case.

"The record discloses as to the alleged discrimi-

natory operation of the dispatch system that although the system devised by the union for preference in referrals could conceivably admit of a discrimination against a nonunion workman, there was no evidence of a scheme or practice of discrimination by the union. The only instance of that kind shown was that of Holderby, and a single isolated incident of this type cannot support a cease and desist order. See *N.L.R.B. v. Amalgamated Meat Cutters,* 9 Cir., 202 F.(2d) 671.

"The Trial Examiner found adverse to the petitioner on this contention because of lack of evidence to support the claim. We think he was correct."

By the same token, the Trial Examiner in the present case, who had spent over a week in hearings on the case and was thoroughly familiar with it, concluded that although the event concerning the college students constituted what in effect was an isolated event of unlawful encouragement, there was simply no substantial evidence of a general practice or agreement of requiring Union membership as a condition of employment. There in fact was no single instance before him in which employment had ben refused because of nonmembership.

5. In footnote 8 on the bottom of page 10 of the Board's brief, it is argued at the end of the footnote that "the Board in substance affirmed the Trial Examiner's finding." The fact is of course that on the same record, the Board reversed the Trial Examiner and held that, by selecting certain portions of the testimony more fully discussed in this petitioner's Initial

Brief, a practice between the parties was established on the record as it stood. The Trial Examiner revised his original findings accordingly, again on the same record. Under that status of the case, the Trial Examiner had no choice but to conform his decision to the Board's opinion, which had reversed his earlier decision. Under no circumstances can the findings be called the Trial Examiner's findings, regardless of the insertion of the make weight and save face recitation of "Upon the entire record in the case, all of which has been carefully read, and parts of which have been reread and rechecked several times" (Tr. 58).

III. REPLY TO BOARD'S ARGUMENT ON FINDINGS

1. In Paragraph 1, the Board states that the petitioners do not deny that if they were parties to an arrangement and practice which made Union membership *and clearance* a condition of employment, they violated the Act. As we have previously discussed, because the record at most only supports a finding of a practice of Union clearance, the Board has attempted to equate Union membership and Union clearance as equivalent conditions and thereby make its case. If the Board did not consider the requirement of Union clearance an independent violation of the Act, there would be no necessity for even referring to it. To assert a violation of the Act, the Board need only say that the petitioners were parties to an arrangement which made Union membership a condition of employment.

Therefore, when, on pages 13 and 14 of its brief, the Board asserts that the issues involved in the *Mountain*

Pacific case are not involved in the present case, the Board is ignoring its own repeated reference to the Union clearance aspect of the case. A system of clearing all employees through the Union would be somewhat equivalent to, although lesser than, an exclusive hiring hall such as was involved in the *Mountain Pacific* case. In that case the Board contended the use of the hall, without safeguards, was illegal. In the present case, the Board contends that the dispatch system is illegal. The theory in both cases is that it gives the Union an opportunity to encourage membership by discrimination. The above court held that, consistent with the long line of cases cited therein, that these circumstances did not of themselves constitute an illegal practice. The court further held that if the Board desired to use such circumstances as evidence of an illegal practice, it could do so prospectively only. The issue in the *Mountain Pacific* case is almost identical to this issue in the present case.

2. Reference is further made on page 14 of the Board's brief to the existence of a "closed-shop arrangement." We understand the closed-shop to be a situation in which hires are only made from the Union, and the Union will permit only Union members to be hired. We understand a Union shop to be the situation wherein the persons can be hired anywhere, but must join the Union as a condition of continued employment. In view of the fact that not one of the fifteen persons who testified as employees in the present case was supplied by the Union, under no circumstances could it be argued that a closed-shop practice prevailed.

The closed-shop arrangement is illegal under any circumstances. The Union shop arrangement is legal if an appropriate contract is negotiated, under both the old law and the 1959 amendment. By its frequent use of the expression "closed-shop" the Board brief attempts to picture in a more serious light the nature of the charges being made in order to justify the punitive remedy which the Board has imposed.

3. On page 16, the Board in its brief makes the assertion: "and as the company knew, the Union issued dispatch slips only to members or applicants for membership (R. 61, 318, 155, 352, 160, 243)." As the Board deems this the key to their case, we believe it appropriate to analyze each of the citations made:

R. 61. This is a reference to the Trial Examiner's Supplemental Report containing the Board's directed finding which we are here reviewing. It hardly constitutes evidence in support of an assertion.

R. 318, William A. Wyman:

> "A. Well, that was before I filled out the application. I had asked him about the dispatch slip and he said, 'Well, we will get the dispatch slip for you as soon as we fill out the application.' And, he said, '*We would like for you to join* the union this summer since the halls are terrifically filled up and we are putting you people out on the job,' which was obviously in front of the fellows who were waiting, I should believe, and he said, '*We would like for you to join the union.*' I believe I said, 'Certainly. I came up here with the intention of joining the union.' "

If there ever was testimony inconsistent with an absolute requirement of Union membership as a condition of employment, it is this testimony. If in fact Union membership was a condition of employment, it is inconceivable that a business representative of a labor union would merely request a potential employee to join.

R. 155. This is the reference to Mr. Wargny's assumption that an employee had to join the Union to get a dispatch slip.

R. 352, Aner W. Ericksen:

> "Q. Is it a fact that you assume that all the people that 341 assigns you are members of Local 341? A. I believe that's correct."

It should be noted that this question by Government Counsel on cross-examination does not refer to all employees hired who might be dispatched through the Union but refers to those employees who are assigned to the employer by the Local. Mr. Erickson's assumption no more constitutes substantial evidence than does Mr. Wargny's assumption. Further, it is unclear whether Mr. Erickson is referring to the fact of general knowledge that practically all construction employees belong to their respective labor unions (*Webb Construction Company v. N.L.R.B.*, 196 F.(2d) 841) or whether he is referring to the likelihood that Union members would remain at the Union hall waiting for open calls.

160. This refers to Mr. Wargny's recollection of one

instance concerning the Union's desire to give priority to men who had been "on the bench" longer. We believe this was a legal position for the Union to take at the time, and it certainly is specifically authorized by the 1959 Amendment. It should further be noted that the language used was not "refuse" but "did not want." We believe this is typical of the effort to distort into illegal conduct what must have seemed to the Union agent to be a perfectly fair position to take. Equitable rotation of employment is certainly a permissible Union function.

R. 243. This refers to the testimony of Denton Moore, talking not to a company representative but to the *labor steward* as follows:

> " 'How does a white man get a job here?' He said, 'In order to get a job the *best thing you can do* is go to Anchorage, join the Laborers Union and request to be sent out to Site 2,' which was the Big Mountain site. And, 'Well,' I said, 'I can't afford to go to Anchorage, I am not fishing this year, I don't have any great amount of income,' and I said, 'Would a letter suffice?' and he said no, you should go in personally. He was trying to be helpful."

Here was a man attempting to promote his own organization and the benefits of Union membership. Even under these circumstances, the labor steward did not say "had to join" but merely said "the best thing you can do." Like the request to Mr. Wyman to join the Union, this conference with Mr. Moore is entirely inconsistent with what would have been said by a labor steward if Union membership was in fact a condition

of employment. The above court and counsel are capable of applying their own expertise in considering the inconsistency of this testimony with a closed shop agreement.

4. On the bottom of page 17 in footnote 12, the Board's brief makes the following comment: "The Company's expectation that such friction would develop shows that it was conscious that the Union and its members thought that the company owed them employment preference." The employment preference was being given to the college students, to which any Union might well object. The Board apparently does not concede that equitable rotation of employment is a proper Union function.

5. In footnote 14 on page 18 of the Board's brief, the Board attempts to explain away the conclusive testimony that all of the employees at Big Mountain were hired without joining the Union, although many subsequently did. In considering the importance of this fact, it must be remembered that this entire case arose out of the charge of Denton R. Moore, a resident of Big Mountain, that he and various other men at the Big Mountain site near Iliamna, Alaska, were refused employment by M-K because they were not members of Local 341 (Tr. 5 and 6). The charges arose not in Anchorage, but at Big Mountain. Yet the evidence is conclusive that these natives were hired as quickly and under such circumstances as was possible without regard to Union membership and many earned very substantial amounts of money (Respondent's Exhibit 5). It further appears that these local inhabitants

were hired at a time when a substantial number of persons were available for employment in Anchorage. If Union membership in fact was a condition of employment with M-K, Local 341 would certainly not have missed the opportunity of collecting initiation fees and dues from this large potential source of membership. Whether a hiring hall was maintained or not would make no difference whatsoever in requiring Union membership. A labor steward was on the site at all times. The fact that most skilled employees were obtained from Anchorage would make no difference nor would hiring by other company personnel. If in fact a practice of requiring Union membership as a condition of employment existed, it would have existed wherever the company and the Union operations extended.

What is established is that for the skilled laborer in Anchorage, Union membership was the universal rule and the Union hiring hall was his most effective means of obtaining employment information at the earliest time with a minimum of effort. Under these circumstances, it is quite possible for Mr. Wargny to assume that everyone was a Union member and had to be a Union member to be dispatched. On the other hand, in the field, Union membership was the exception rather than the rule, and the local employees normally did not join until after their employment. This is simply the result of the various economic and experience factors operating in the construction industry over the years. It does not constitute a conscious practice or arrangement.

6. It is noted on page 20 that the Board again contends that the Company requirement of dispatch slips is sufficient to establish that the Company violated the Act. The Board cites *Morrison-Knudsen, Inc., v. N.L.R.B.* (C.A. 9, No. 16301, decided August 10, 1959). This case had nothing whatsoever to do with dispatch slips, but rather involved, according to the Board's findings, the refusal of a business agent to permit the Kings River Constructors to employ a person because he was not a member of the business agents' local.

The Board's contention above paraphrased is directly contrary to this Court's decision in *Mountain Pacific, Swinerton* and other decisions therein cited that a dispatch system is not illegal itself, but only an event of discrimination in the administration of such a dispatch system is illegal. The Board contends that Mountain Pacific is not in issue in the present case, yet persists in asserting that a dispatch system itself constitutes a violation of the Act. As we have previously discussed, this reasoning so permeates the opinion as to compel the conclusion that the Board's decision is not based on a requirement of union membership but on the operation of a dispatch system.

7. On page 21, the assertion is made that the Union has never denied the existence of the arrangement as alleged by the Board. The fact is the Union has denied the allegations in their Answer to the Complaint and the existence of an arrangement or agreement was categorically denied by Mr. Erickson and even by Mr. Wargny. In view of the status of the proceedings at

that time, it would hardly warrant opening up the hearing at Anchorage, Alaska, just to deny that which had already been denied both in pleadings and by the parties who did testify. It must be remembered that at this time, the *Brown-Olds* blanket reimbursement order had not been imposed, or even contended for by the General Counsel. The Trial Examiner did not recommend blanket reimbursement or any reimbursement in his initial order. The Company had already acquiesced in the pertinent cease and desist order, and there appeared to be little reason to call all parties back to reopen a record which both counsel and the Trial Examiner originally felt was inadequate to support the finding of any violation, other than the incident of the college students.

IV. BROAD FORM OF ORDER

On page 26, the Board has cited a Third Circuit decision (*N.L.R. B. v. United Mine Workers of America,* District 2, 202 F.(2d) 177) apparently in support of a contention that the Board's broad power to determine the scope of its orders is sufficient to support any exercise of that power by reciting the magic words that "The unfair labor practices found . . . compel an inference that the commission of other unfair labor practices may be anticipated in the future" (Tr. 84). This precise issue is decided by the above court adversely to the Board in the case of *Morrison-Knudsen, et al., dba Kings River Constructors v. N.L.R.B.,* No. 16,301, decided August 10, 1959. Morrison-Knudsen was one of four joint venturers composing the Kings River Con-

structors. In that case the court held that there was no evidence indicating that petitioners had in the past been guilty of any unlawful conduct prohibited by the Board order *other than this practice.* "Other forms of encouragement of union membership and loyalty may not 'fairly be anticipated' from the mere existence of a practice of this sort."

There is no evidence in the present case nor is there any contention in the Board's Brief that M-K has committed any other type of unfair labor practice, and there is therefore no necessity for a cease and desist order referring to other types of violations.

We note with some interest that on page 30, the Board cites a case involving M-K presently on appeal to the Court of Appeals for the Second Circuit. It would seems that the Board should at least wait until the case has been finally determined.

V. BROWN-OLDS REIMBURSEMENT ORDER

1. On page 32, the Board asserts that the Petitioners rely on the national defense nature of the work being performed as a defense to an appropriate remedy. No such contention has been made. What M-K has attempted to explain is the importance of the utilization of the union hiring hall in effecting efficient dispatch of persons in the construction industry. This importance was so clearly recognized by Congress that in the remedial legislation of the 1959 Disclosure Act, the construction industry was selected for specific treatment permitting pre-hire agreements and the maintenance of hiring halls.

Notwithstanding this Congressional recognition of the importance of the hiring hall in the construction industry, the Board would still require the reimbursement of all dues and initiation fees for an unlimited period as the appropriate remedy for conduct which, even under the Board's view, would be entirely legal under the present Act. The Board is attempting to impose its most drastic penalty on a situation which Congress has attempted to alleviate.

2. On page 37, the Board contends that the company benefited by shifting to the union the burden of finding most of its skilled workers, and this benefit would warrant the reimbursement order entered. As appears from Mr. Wargny's testimony, the company on the White Alice project alone maintained a personnel manager and two assistants in the company hiring office. However, M-K is not the only contractor doing business in Alaska, and any employee desiring construction work would go to the union hall where all of the contractors call for personnel. Otherwise the employee would have to make the rounds of all of the various contractors. The Board's contentions illustrate the complete lack of understanding of the practical factors which make the union hiring hall the most efficient source of employment for the men involved.

3. On pages 34 and 35 of its brief, the Board cites, in support of its statement that Courts of Appeal have uniformly approved blanket reimbursement orders, a series of cases, none of which are in any manner similar to the case at hand.

In *Dixie Bedding Manufacturing Company v. N.L.R.B.,* 268 F.(2d) 901, the Board ordered the reimbursement to employees of dues *checked off* by the employer for the benefit of a minority union, a deliberate, executive action.

Local Lodge Number 1424 v. N.L.R.B., 264 F.(2d) 575, involved a minority union and a dues check off system. *N.L.R.B. v. Local 404,* 205 F.(2d) 99, involved reimbursement to certain named persons for whom there was testimony in the record. This was not a blanket reimbursement case.

N.L.R.B. v. Broderick Wood Products Company, 261 F.(2d) 548, involved an illegal union security contract, a dues check off under the contract and actual discharge of many employees under the contract.

N.L.R.B. v. General Drivers, etc., 264 F.(2d) 21, also involved a dues check off situation.

In every one of these cases, there was the element of responsible, deliberate action by the company and the union fully evidenced either by a written contract, an actual event of discrimination or specific evidence concerning particular employees.

4. On page 34, reference is made to the union's threats of discharge as impelling the employees to pay their fees and dues. An examination of the record to which citation is made reveals the single isolated instance of a minor labor steward, Steve Alukas, threatening one of the college students after he had been hired (Tr. 183-184). There is no showing that the em-

ployee ever asked the company about this threat or made any effort to have the matter clarified. It is very questionable that such an insignificant event would be binding even upon the union, much less the employer.

We submit that if there ever was a case in which the blind application of an obsolete policy by the Board resulted in an oppressive order not calculated to effectuate the policies of the Act, it is this case. *N.L.R.B. v. United Mine Workers* (1958) 355 U.S. 453, 2 L.ed. (2d) 401.

5. In considering the appropriateness of the Brown-Olds blanket reimbursement remedy, we note that the Board has failed to make any comment concerning M-K's contention on pages 29 to 33 of its initial brief that the discriminatory application of the blanket reimbursement order under the amnesty program constitutes an abuse of discretion. We submit that the Board failed to respond to this contention for the reason that there is no adequate response, particularly in view of M-K's own acquiescence in the original cease and desist order as framed in the first report by the Trial Examiner. Although M-K objected to the broad form of the order, and such objections have been uniformly supported by the courts, it nevertheless did not except to the imposition of the principal order, and this was done in February, 1958, prior to the June 1, 1958, date on which General Counsel, Jerome D. Fenton, requested that hiring arrangements be voluntarily conformed to the Act (Company Brief, page 31). This consent to the order was done not because of an admission that the Company had engaged in an illegal ar-

rangement, but simply as assurance that they would make every effort to in all respects comply with the Act and that even the isolated instance of the college students would be the basis for more careful control of supervisory practice.

VI. FAILURE TO TIMELY URGE ENTRY OF THE BLANKET REIMBURSEMENT ORDER

On page 39, footnote 30, the Board purports to answer the Company's contention that under the Board's own rules as well as the Act, the issue of blanket reimbursement was not timely presented. The Board now unequivocally contends that although the parties may be subject to the rule, the Board is not. In support of this contention the Board cites six cases, only one of which discuss the point involved.

In *N.L.R.B. v. Townsend,* 185 F.(2d) 378 (C.A. 9) the court refers to Section 10(c) (29 U.S.C.A. Sec. 160 (c)) which provides that the order of the Trial Examiner shall become the order of the Board, if no exceptions are filed. The court goes on to hold that under Section 10(d) the Board may modify or set aside an order previously made by it. This case merely deals with the finality of a Board order, and not the nature of the issues which can be considered. Furthermore, the case does not consider the impact of the Board's own self-imposed rule which prohibits any matter not included in the Statement of Exceptions from thereafter being urged before the Board. The prejudice of this arises from the fact that all parties had rested and the Trial Examiner had made his supplemental report,

which did not contain a recommendation for blanket reimbursement, before such contention was even raised by the General Counsel. The Board has not and cannot cite a case which will hold that a rule applicable to the parties proceeded against is not equally applicable to the Board, as represented through its General Counsel. The combination of the Board as prosecutor and judge is difficult enough without giving to it immunity from its own rules.

The cases have consistently held that individual parties who take no exception are precluded from contesting not only the substantive finding of the Board but also the validity of remedial orders. See *N.L.R.B. v. Bull Insular Lines, Inc.,* 233 F.(2d) 318; *N.L.R.B. v. Auburn Curtain Co., Inc.,* 193 F.(2d) 826; and *N.L.R.B. v. Holger Hansen,* 220 F.(2d) 733.

The Board itself has recognized that the correct disposition of such a case in which the General Counsel fails to except to the Trial Examiner's order is for the Board to adopt the order without passing on the merits. The findings are then not precedent in other cases. Colonial Fashions (1954) 110 N.L.R.B. 1197.

Respectfully submitted,

ALLEN, DEGARMO & LEEDY

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No. 16403

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN RUSSELL HANSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 16403

IN THE

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JOHN RUSSELL HANSON,

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APPELLEE'S BRIEF.

I.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction by a jury on November 28, 1958, in a trial before the United States District Court for the Southern District of California, the Honorable Ernest A. Tolin presiding, which adjudged the defendant guilty on each of twenty-one counts of an Indictment returned by the Grand Jury for the Southern District of California. There were twenty-two counts in the Indictment, which was brought under the provisions of Sections 287 and 495 of Title 18, United States Code, but Count One was dismissed by the Court because of the manner in which the verdict had been made out by the jury as to Count One.

The jurisdiction of the United States District Court was based upon Section 3231, Title 18, United States Code.

On December 5, 1958, the defendant appeared in open court in person and by counsel and was sentenced to the custody of the Attorney General. A written Judgment and Commitment was filed by the Court on the same day. The Criminal Docket Entries made by the Clerk of the United States District Court for the Southern District of California show an entry of the terms of the judgment and conviction and, immediately thereafter, the following notation appears in typewriting: "Judgmt. Ent. 12/8/58." However, the number "15" is shown to have been written in ink over the number "8" in the above date "12/8/58."

The Clerk's minutes of the case for December 12, 1958, show that on that date Paul Fitting was appointed as counsel for appellant on the appeal and also that the Court ordered the judgment should be entered on 12/15/58.

The above Criminal Docket Entries and the minutes of the Court for December 12, 1958 are contained in the supplemental record on appeal before this court and therefore appellee is unable to refer to the Clerk's Transcript of Record at this time.

Normally this court would have jurisdiction to entertain the within appeal and to review the proceedings leading to the judgment of December 5, 1958, by reasons of Sections 1291 and 1294 of Title 28, United States Code. However, because of the status of the record as indicated above it appears that there is a question as to whether or not this court actually does have jurisdiction on appeal. This point is discussed herein in the Argument.

II.
STATUTE INVOLVED.

The defendant was prosecuted on Counts One, Four, Five, Six, Nine, Ten, Eleven, Fourteen, Sixteen, Seventeen, Eighteen, Nineteen and Twenty-Two of the United States Code Title 18, Section 287, which reads in pertinent part as follows:

> "Whoever makes or presents . . . to any department or agency . . . any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both."

The defendant was prosecuted on Counts Two, Three, Seven, Eight, Twelve, Thirteen, Twenty and Twenty-One under United States Code, Title 18, Section 495, which reads in pertinent part as follows:

> "Whoever falsely . . . forges . . . any . . . writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States of any officers or agents thereof, any sum of money . . .
>
> "Whoever utters or publishes as true any such . . . forged . . . writing, with intent to defraud the United States, knowing the same to be . . . forged . . .
>
> "Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

III.
STATEMENT OF THE CASE.

Fourteen of the twenty-two counts of the indictment returned against appellant on October 15, 1958, contain charges of the making of as many separate false claims for refund of income taxes. Four of the remaining eight counts charge the forgery of separate United States Treasury checks. The other four counts charge the uttering of each one of said checks.

It is to be noted that there are six post office box addresses set forth in the indictment. Counts One through Five involve Post Office Box 235, McKittrick, California. Counts One, Four and Five charge that false claims for refund on income taxes on Form 1040A were filed for that address in the names of Joseph J. Cook, Kenneth Cook and Joseph Cook. Counts Two and Three charge the forgery and uttering of a Treasury check for the sum of $267.40 payable to Joseph J. Cook mentioned in Count One.

Counts Six through Ten involve Post Office Box 1162, Taft, California. Counts Six, Nine, and Ten charge the making of false claims for refunds in the names of Peter Hall, William Hall, and William H. Hall for that address. Counts Seven and Eight charge the forgery and uttering of a Treasury check for $296.20 in the name of Peter Hall set forth in Count Six.

Counts Eleven, Fourteen and Fifteen charge the making of false claims for refunds for Post Office Box 304, Glennville, California, in the names of Allan J. Jones, Allan Jones and James Jones. Counts Twelve and Thirteen charge the forgery and uttering of a Treasury check

in the sum of $270.50 payable to Allan J. Jones set forth in Count Eleven.

Counts Sixteen, Seventeen and Eighteen charge the making of false claims for refunds with respect to the address of Post Office Box 451, Poplar, California, in the names of Stanley Jones, Sidney J. Jones and Sidney Jones. There are no counts involving the forgery and uttering of a check issued in any such names.

Counts Nineteen and Twenty-two charge the making of false claims for refunds with respect to Post Office Box 916, Tehachapi, California, in the names of Walter Adams and James Adams. Counts Twenty and Twenty-one charge the forgery and uttering of a Treasury check in the amount of $290.10 payable to the name of Walter Adams, mentioned in Count Nineteen of the indictment [Clk. Tr. 2-15]. All of the offenses were alleged to have occurred from March 28, 1958 to June 13, 1958.

On November 18, 1958, when the matter came on for jury trial [Rep. Tr. 39-A] the jury was selected and impaneled. During the proceedings counsel for the government and appellant received a written copy of the roster of the venire and exercised peremptory challenges in writing thereon [Clk. Tr. 21, 22].

Immediately thereafter, in the presence but out of the hearing of the jury, counsel for both parties and the defendant approached the side bar. The following colloquy took place:

> "The Court: Defense counsel has challenged twelve, peremptorily. You have challenged twelve. You are only allowed ten.
>
> Mr. Turner: I am sorry.

The Court: What do you wish to do?

Mr. Turner: I will remove two of the peremptory challenges, your Honor, if two of them coincide with her peremptory—

The Court: Please speak out so the reporter can hear you.

Mr. Turner: If two of them coincide with the peremptory challenges made by the government, perhaps it can be disposed of in that way.

The Court: You are asking me to enlarge the number of challenges?

Mrs. Bulgrin: I think he was asking the court to take off two that may have coincided with two I had made, but I think perhaps the better procedure would be for him to remove two of his own selections, your Honor.

The Court: If we enlarge the number of challenges, will we have enough?

The Clerk: No, your Honor.

The Court: You elect which ten you are going to challenge.

Mr. Hanson, whenever your attorney comes to the side bar here, you come along.

The Court: I see that the names of Joe L. Stevens and Harry Green, who were originally challenged have now been removed from the challenges. Is that correct?

Mr. Turner: May I see? Yes, your Honor.

* * * * * * *

The Court: All right. The clerk will now call the jurors to the box in the order in which they remain upon the consolidated lists as unchallenged."

The clerk then called twelve names and the jury was sworn upon the direction of the Court. [Rep. Tr. 39-B

to 39-D.] Subsequently two alternate jurors were called, the Court allowing the parties one additional challenge in that respect. [Rep. Tr. 39-E, 39-G, 39-H.]

It appears that nothing further was said by counsel for appellant with respect to the procedure followed in exercising the peremptory challenges.

Government counsel made an opening statement indicating to the jury that the government's evidence was expected to show that the defendant's method of operation in connection with the charges in the indictment was to rent post office boxes under fictitious names, filing several false claims for income taxes with the government showing the addresses of the post office boxes. The returns would all be filed under the false name under which the box was rented or variations of that name. In four instances, in connection with the charges in the indictment, United States Treasury checks for refunds were issued to four different post office boxes. The defendant then started accounts at banks in small nearby towns with small cash deposits. A few days later he came into the banks and deposited the United States Treasury checks which he had gotten as a result of filing the false returns. Almost simultaneously he would then draw out of the account practically all the money that was represented by the small cash deposits and the proceeds of the Treasury checks [Rep. Tr. 47, 48].

After opening statement by defense counsel, the government called five witnesses to the stand. The first witness was the Assistant Regional Disbursing Officer for the Division of Disbursement of the United States Treasury Department in Los Angeles. His testimony primarily involved the four United States Treasury checks, Exhibits

Nos. 1, 2, 3 and 4, involved in Counts 2, 3, 7, 8, 12, 13, 20 and 21 of the indictment and related primarily to the issuance of these checks by the Treasury Department and the mailing of them in window envelopes to the name and address of each payee shown on the exhibits. [Rep. Tr. 70-80.]

The next witness, Julius A. Horwitz, was the Chief of the Computation, Verification and Matching Section of the Collection Division of the Los Angeles District of the Internal Revenue Service, which Section processed all of the tax returns that came into the Los Angeles District. Those returns included 1040 A Forms. His testimony particularly related to Exhibits 5 through 18, which comprised the alleged false returns set forth in Counts 1, 4, 5, 6, 9, 10, 11, 14, 15, 16, 17, 18, 19 and 22 of the indictment. He stated that those forms are available to the public in a number of ways, from Internal Revenue Offices, banks and Post Offices. Approximately 99 percent of the returns which were processed by his Section came to the Bureau of Internal Revenue through the mail. Exhibits 5 through 18 were being handled by the Income Tax Processing Group when he first saw them and they were taken out under his supervision. Some of the returns had been actually processed, that is, Exhibit No. 11, William H. Hall; Exhibit No. 12, Allan J. Jones; Exhibit No. 14, James Jones; Exhibit No. 6, Stanley Jones; Exhibit No. 15, Sidney J. Jones; Exhibit No. 17, Walter Adams; Exhibit No. 18, Peter Hall; and Exhibit No. 7, Joseph Cook. However the exhibits named were not all processed through for the issuance of a refund check. The ones on which checks were issued were Exhibit No. 7, Joseph Cook; Exhibit No. 12, Allan J. Jones; Exhibit No. 17, Walter Adams;

and Exhibit No. 18, Peter Hall. All of these returns were received by the Department of Internal Revenue through the mail for processing purposes. Mr. Horwitz further testified that the blank 1040A Forms were first available to the public for the year 1957 after Christmas at the end of that year or right after January 1, 1958. The tax returns had to be filed by April 15 and all of the returns in Exhibits 5 to 18 were filed before that date. [Rep. Tr. 81-94.]

The next witness was Frank D. Johnson, Chief of the Claims Section of the Los Angeles District of the United States Bureau of Internal Revenue. Mr. Johnson's testimony primarily was concerned with Exhibits 7, 12, 17 and 18 (it appears that Exhibit 17 was erroneously enumerated in a question put by government counsel as No. 19. Other questions and answers establish that the witness was talking about Exhibit 17 [Rep. Tr. 97] rather than Exhibit 19 at that point of the proceedings) which exhibits were the 1040A forms involving Joseph J. Cook, Allan J. Jones, Walter Adams and Peter Hall, which had been processed to the point of a check being issued [Rep. Tr. 90] and Exhibits 1, 2, 3 and 4 which were the four government checks. The testimony of this witness related the issuance of the checks to the particular 1040A Form. For instance, Exhibit 1, a check for $296.20, was related to Exhibit 18 which involved Peter Hall. By using certain account numbers which were repeated on related documents, the witness also testified, in effect, that the check which was Exhibit 4 was issued because of Exhibit 7, the 1040 A return in the name of Joseph J. Cook. He testified similarly as to Exhibits 2 and 12, the check and 1040 A Form in the name of Allan J. Jones, and also with respect to Exhibits 17 and 3, which were the check and 1040 A Form in the name of Walter Adams. He testified

that his records showed that each one of the four checks had been issued to the payees shown thereon and for the amount set forth. The total amount of all four checks was approximately $1,124.20. [Rep. Tr. 96-106.] The government, pursuant to a stipulation with appellant, then offered in evidence the names of the real persons to whom the Social Security Numbers on nine of the 1040A returns were actually issued and also the dates that the numbers were issued. [Rep. Tr. 108, 109.] They were different than the names on the returns.

The next witness on November 18, 1958, was a receptionist supervisor in the Los Angeles office of the Social Security Administration who testified in part that four of the Social Security Numbers contained on other 1040 A returns in evidence not covered by the stipulation were "impossible" numbers. She further stated that every person who is assigned a Social Security Number retains it for a lifetime. [Rep. Tr. 109-111.]

The last witness on that day was an employee of the Brown Drilling Company in Long Beach who testified that neither Sidney J. Jones listed on Exhibit 15, nor the persons named on other 1040A Forms which were Exhibits 7 and 11 were employed by the Brown Drilling Co. [Rep. Tr. 112-118.] (All of these exhibits listed the Brown Drilling Co. as the employer of the alleged taxpayer named therein.)

On the second day of trial, counsel for appellant made a motion for the exclusion of witnesses "until such time as the prosection has placed on the stand all their respective identification witnesses." [Rep. Tr. 21.] Government counsel opposed the motion, stating, "I do not *believe* any of these people were present at the same time,

at the same place; their testimony will deal with various occasions." Later she stated "*to the best of my knowledge* they are all at different times and places, your Honor." Government counsel also stated in response to the Court's inquiry that the witnesses had made identifications prior to trial. The Court stated subsequently that "the motion comes pretty late anyway. This is the second day of trial. The courtroom has had a lot of witnesses present here. Some courts never grant these motions. I do in some instances where it appears proper to do so, but there has not been that showing here. So the motion will be denied. Bring in the jury." [Rep. Tr. 121, 123.]

The next four witnesses, Marlin Rolain, Joseph A. LaRoche, Russell Goforth and Harold J. Brandenburg, gave similar testimony to that of Alice Barnwell, who worked in the personnel department of the Brown Drilling Co. They were employed by the Brown & Williamson Tobacco Co., Singer Sewing Machine Company, and Firestone Tire & Rubber Co. Rolain testified that, with respect to Exhibits 6, 8 and 10, which were 1040 A forms, the persons named thereon, Kenneth Cook, Stanley Jones, and William Hall, had never worked for the Brown & Williamson Tobacco Co. The latter company was the employer shown on each of those exhibits. LaRoche testified that with respect to Exhibits 5, 9, 12, 16 and 18, which were 1048 forms in the names of Allen J. Jones, Joseph Cook, Sidney Jones, James Adams and Peter Hall, and which listed the Singer Sewing Machine Co. as the employer, none of those persons had ever worked for that concern. Mr. Goforth gave similar testimony as that of the previous witness, but dealt with a Singer Sewing

Machine Company facility at Armona, California. [Rep. Tr. 123-132.]

Mr. Brandenburg also testified in a similar vein, being the Assistant Comptoller of the Firestone Tire & Rubber Co., Coast Division. His testimony primarily involved Exhibits 14 and 17 relating to Walter Adams and James Jones where the Firestone Tire & Rubber Co. was shown to be the employer. He stated that no persons by those names were employed by that concern in California. [Rep. Tr. 132-134.]

The next four witnesses, Alice M. Perciful, Laura A. Skelton, Armand K. Hanna, and Margaret S. Werling were postmasters, respectfully, at Tehachapi, Glennville, Taft and McKittrick. Mrs. Perciful's testimony involved Exhibit No. 22, an application for Post Office Box 916, Tehachiapi, California, in the name of Walter Adams. It also contained the name of James Adams and was dated October 15, 1957. She described the applicant for the post office box as a nice-appearing gentleman, medium colored hair, average build, who appeared to be a very well-dressed person for a truck driver, which he listed as his occupation. His box never received any mail except one brown government envelope. The letter was taken out of the box when the town was having a Memorial Day celebration on the 31st of May, 1958. She stated that Tehachapi is about 80 miles from Taft and about 42 miles from Bakersfield. [Rep. Tr. 135-141.]

Mrs. Skelton testified that Exhibit 23 was a post office box receipt for box 304, Glennville, California, in the name of Allan Jones which she made out herself. It was dated September 13, 1957 for a year. She did not remember what the person looked like who rented the box, but

he was about 5 feet 10. The box did not receive any mail that she could recall except one brown government envelope, which appeared to contain a check. This occurred in May of 1958 and it was taken out during the night or over a week-end while she was not at the post office. [Rep. Tr. 142-146.]

Mr. Hanna was the assistant postmaster at Taft, California, and testified that Exhibit No. 24, an application for post office box 1162, Taft, California, dated December 2, 1957, in the name of Peter Hall, was part of his records in the post office, having been made out in the regular course of business when the box was rented. This particular application contained a signature of the alleged "Peter Hall" made out by the applicant. Taft was about 40 miles from Bakersfield. [Rep. Tr. 147-152.]

Mrs. Werling testified that Exhibit No. 25, a "box rent register" for post office box 235, McKittrick, California, in the name of Joseph Cook, related to the box which she rented to a person giving the name of "Joseph Cook." It was first rented in the last of December, 1956, and eventually was re-rented up to June 30, 1958. She had never seen the person who rented it around McKittrick or

At one time there were two personal letters in the box that laid there for some time and they were taken out at night. There was a brown government envelope put in the box some time in May, 1958. It stayed in the box about two or three weeks and was taken out over the weekend of Memorial Day. She stated that McKittrick was about 40 miles from Bakersfield and about 17 miles from Taft. She could not identify specifically the person who rented the box but testified that he has a fair complexion and

looked tall to her since she was only 5 feet 2. [Rep. Tr. 153-161.]

Mrs. Werling had testified that the person who rented the box originally re-rented it for one year on July 17, 1957. She was later recalled [Rep. Tr. 437-439] since the records to which she had referred contained the date of July 15, 1957, rather than July 17. The witness explained that she had apparently looked at the receipt below it which contained the date of July 17.

Mary F. Gray, the clerk in charge of the Poplar Rural Station out of Porterville, California, was later called by the government with respect to the rental of a post office box. This was a contract station where post office boxes are rented to the public. Mrs. Gray made out Exhibit 32 herself, which is a receipt for post office box 451 in that station. It was rented on January 29, 1958 up to June 30, 1958. Mrs. Gray identified the appellant, John Russell Hanson, as the person who rented the box in the name of either Sidney or Stanley Jones. The witness made a mistake on the post office box number and endeavored to find appellant to advise him of the mistake, but could not locate him. Since appellant had told her he was going in the trucking business she asked around town if anyone knew someone who was going in the trucking business but she could not find him. About a month later, appellant came into the station and she called him by name of "Mr. Jones," informing him that she had put the wrong box number on the receipt. At that time appellant got the receipt out of his pocket and they had a conversation with respect to the mistake. Mrs. Gray then asked him questions about the fact he had told her he was going in the trucking business and that she had not been able

to locate him. This was about a month after January 29, 1958. [Rep. Tr. 282-291.]

After Mrs. Werling was called, the government called Florence K. McCown, who was chief of the Returns Index and Service Section of the Internal Revenue Service. She testified with respect to the W-2 forms which are required to be attached to each return that comes in to the Service to be prosecuted. She stated that, with respect to the 1040-A returns which were involved in this case, the W-2 Form had been sent to the Mid-West Service Center and would not be available to any one, including the United States of America, until approximately September of 1959.

The remaining seven witnesses called on November 19, 1958, by the Government were employees of certain banks located in Bakersfield, Oildale and Taft, California. Mr. Merle Fisher was the assistant cashier at the East Bakersfield Branch of the Bank of America. He stated that East Bakersfield is about a mile and a half from Bakersfield and approximately 42 miles from Tehachapi. His testimony primarily involved Government's Exhibit No. 27 which was comprised of a sheet called "Statement of Account" and certain attachments composed of deposit slips, and application card for an account, and three personal checks, and also Government's Exhibit No. 3 which was the Treasury check in the name of Walter Adams.

Exhibit No. 27 involved an account which was opened in the name of "Walter Adams," Post Office Box 916, Tehachapi, California. According to the procedures in the bank the two signatures in the name of "Walter Adams" on the application card were required to be placed thereon

by the applicant at the time the account was opened. This account was started with a cash deposit of $48.50 on June 6, 1958. [Rep. Tr. 171-172.] The witness testified that the statement of account showed a $35.00 check payable to cash and drawn by the customer was cashed in the bank on June 9, 1958, and on June 12, 1958, there was also a similar check for $100 cashed. Further, on June 10, 1958, another $200 personal check was cashed. The person who had the account received a total of $335 for the personal checks. They were all made out in similar fashion and handwriting.

The witness related Exhibit No. 3, the Treasury check payable to Walter Adams, Post Office Box 916, Tehachapi, California, for $290.10, to the Statement of Account in that the sum of $290.10 was posted on the Statement of Account as a deposit on June 10, 1958. A teller's stamp from that bank was on the reverse side of the Treasury Check showing a deposit of that check on June 10, 1958. It should be noted that the deposit of the Treasury check took place on the same date when the personal check for $200 was cashed. The personal check for $100 was cashed two days later. At the end of the transactions there was $3.60 left in the account on June 12, 1958. There were no further transactions since that time and those were the only transactions shown on the account. This witness did not make personal identification of the applicant who opened the account. [Rep. Tr. 173-176.]

Sidney E. Bishop testified primarily with respect to Government's Exhibit No. 28, which was similar to Exhibit No. 27 in that it contained a Statement of Account, deposit slips, personal checks and other material in the

name of Allan J. Jones, Box 304, Glennville, and also as to Government's Exhibit No. 2 which was the Government's Treasury Check in the name of Allan J. Jones, box 304, Glennville. Mr. Bishop was the Chief Clerk of the Crocker-Anglo National Bank, Oildale, California, and he stated that the documents in Exhibit No. 28 were made out in the bank in the ordinary course of business. He testified as to the general nature of the documents in that exhibit and said that the signature Allen Jones on the application card was made by the applicant for the account. He further testified that "Jackie Price" was the "new account" girl who opened the account [Rep. Tr. 179-182].

The initial deposit in the account was in the amount of $48.50 and it was opened on June 10, 1958. On June 12, 1958, Exhibit No. 2, the Treasury check for $270.50 payable to Allen J. Jones, was desposited in the account since the bank's markings were on the check [Rep. Tr. 183].

Also on June 12, 1958, the customer's check made out to "cash" for $35 was paid in cash at the bank against the account; also a check for $200. The two checks were attached to Exhibit No. 28, and were both in the name of Allan J. Jones, made out in similar handwriting and manner. The Government check had to have indorsement of the so-called payee on the reverse side thereon, when deposited. On June 16, four days later, a similar personal check for $80 was also cashed in the bank and a balance was left of $4 in the account. There was no activity since and the above transactions were all that were shown in the account [Rep. Tr. 184-185].

There was no personal identification of the applicant from this witness.

Jackie Price testified next, being employed by the Crocker-Anglo National Bank, in Oildale, California, as was the case of the last witness, in the capacity of New Accounts Clerk and stenographer. She testified as to the procedure in opening new accounts which involved the applicant signing the signature card. The applicant personally appeared when she opened the account and signed it. She testified as to what happened when this particular customer came in and opened an account in the name of "Mr. Allen J. Jones" [Rep. Tr. 189-192]. She also described the man as approximately 5 ft. 10, light brown hair, and fair complexion. The applicant appeared to have his right hand wrapped up in a gauze dressing with tape around it. He wrote his name on the application with his left hand. Since he wrote so well with his left hand, Miss Price asked the applicant if he was left-handed or right-handed and he told her that he was right-handed. However, he said he could write with either the right or left hand. The applicant also told her that he had had an accident. She also stated that the man kept putting his left hand, which was not bandaged, to his face and that he also kept his head down. She had never seen the man before and she did not see him after the application was made out [Rep. Tr. 192-196]. Although this witness generally described the person who made the application she was not able to recognize him at the time of trial [Rep. Tr. 208]. However, she did testify that the person who sat down and wrote out the application for the account in Exhibit No. 28 did bear a resemblance to the defendant, John Russell Hanson. However, she was unable to say that appellant was "definitely him". In other words, she did not have a positive picture of him in her mind [Rep. Tr. 211].

The next witness was Edward Plummer, Jr. Assistant Manager of the Crocker-Anglo National Bank in Taft, California. His testimony primarily concerned Exhibit No. 29, which was a sheaf of documents similar to Exhibits 27 and 28, that is, a statement of account, deposit slips, personal checks, etc., in the name of Peter Hall, at Box 1162, Taft, California, and also Exhibit No. 1, which was the Treasury check in the name of Peter Hall, Box No. 1162, Taft, California. Mr. Plummer testified that a Mr. Marvin Evans also worked in the bank for him, and that Crocker-Anglo National Bank was about a block away from the Bank of America in Taft. Mr. Plummer testified that the signature on the signature card required from all persons opening accounts in the bank was placed there by the person opening the account. Also, on the reverse side of the card the first four lines relating to personal information had to be filled out by the same person. He also testified that the ledger sheet contains the signature of the person who opens the account. All of the documents in Exhibit No. 29 were made out in the ordinary course of business of the bank [Rep. Tr. 212-214]. This witness testified that the records in Exhibit No. 29 showed that on June 12, 1958, a person who stated he was Peter Hall came into the bank and opened the account with a deposit of $38.50. The next transaction was on June 13, 1958, when the deposit of a government check in the amount of $296.20 was made. He knew it was a government check by a number on the deposit slip and also that it was Exhibit No. 1 by examining that Exhibit for the bank indorsement dated July 13, 1958. After the credit of $296.20 from the Treasury check was deposited to the account, on the same day "Mr. Hall" wrote

out a personal check to cash in the amount of $250, which was posted as a debit to the account. In other words, the customer got $250 in cash in the bank [Rep. Tr. 215, 216].

The government check contained an indorsement on the reverse side in the name "Peter Hall" which would have been on it before it was taken in by the bank for deposit.

After the $250 personal check was cashed, and the Treasury check for $296.20 deposited on June 13, 1958, another transaction took place. On June 17, 1958, "Mr. Hall" cashed a similar personal check for $80 in the bank and received the money therefor. That reduced the balance in the account to $4.17. That was the last transaction in the account. The above transactions were the only ones which were shown to have occurred [Rep. Tr. 216-218]. Mr. Plummer testified that he recalled seeing the person who opened the account. He described him as about of average height, with a slender build. The person also had his right arm in a cast and in a sling. However, Mr. Plummer did not remember the applicant's face. He did recall that the man used his left hand in signing the signature card [Rep. Tr. 218-219].

The person who opened the account told Plummer that he had been in an accident. Plummer testified that he could not recollect what the person looked like. That person could have been in the courtroom but Plummer would not be able to recognize him if he were [Rep. Tr. 221, 222]. He said that in writing with his left hand the person appeared to be skilled in writing with that hand [Rep. Tr. 222].

Mr. Marvin Evans, from the same bank in Taft, testified next. He worked under Mr. Plummer, assisting in

the supervision of operations. His testimony primarily concerned Exhibits No. 29 and No. 1 [Rep. Tr. 226]. Mr. Evans took the deposit of the Federal check and "turned right around and cashed the check for Peter Hall. He had a special check already made out and cashed it." This was on June 13, 1958. "Peter Hall" also handed Evans the deposit slip dated on the same day. All that Evans put on it was the bank number. He identified appellant as the man who had handed him the deposit of the Federal check with the deposit slip and then cashed the personal check for $250 [Rep. Tr. 226-228]. This was on a Friday and it was after 3 o'clock [Rep. Tr. 228-229, 233, 234]. Evans further testified that on June 13, "Peter Hall" had all the papers made out before he came to the window. At that time he was not wearing a sling [Rep. Tr. 236-237]. The Exhibit shows that on June 17, 1958, there was a balance of $4.70 left in the account.

During cross-examination, redirect examination and recross-examination the witness was interrogated with respect to subsequent conversations he had had with certain law enforcement officers regarding the identity of the alleged "Peter Hall". It was brought out that at that time Mr. Evans picked out a photograph of the appellant as the person who had deposited the government check and cashed the personal check at the time Mr. Evans dealt with him. This photograph was received as government's Exhibit No. 30. Counsel for defendant stated that he had no objection to the photograph going into evidence [Rep. Tr. 247-250].

The next witness was Lorraine Hunt, Assistant Cashier for the Bank of America, also located at Taft, Calif.,

this was the bank which was a block away from the Crocker-Anglo Bank in the same town (and 40 miles from Bakersfield, according to the witness Hanna). Her testimony primarily related to government's Exhibits No. 31 and No. 4. No. 31 was similar to Exhibits 27, 28 and 29, containing a sheaf of documents including the statement of account, personal checks and deposit slips in the name of Joseph J. Cook, Box 235, McKittrick. Exhibit No. 4 was the Treasury check relating to Joseph J. Cook, Box 235, McKittrick, California. The documents in Exhibit No. 1 were made in the regular course of the bank's business [Rep. Tr. 253, 254, 255].

Only the signature of the applicant for the account of Joseph J. Cook was in the handwriting of that person. Other writing on the application card with reference to address, business and other personal information was that of Pauline Carlton, the bank employee [Rep. Tr. 256].

The $40 deposit shown on the ledger sheet was the amount of the initial funds which started the account on June 12, 1958. On June 13 there was a check deposited by "Joseph J. Cook" for $267.40. Exhibit No. 4, the Treasury check for $267.40, was the check which was deposited on June 13 in that account [Rep. Tr. 257]. The handwritten indorsement on the reverse side of Exhibit No. 4 of "Joseph J. Cook" had to be placed on the check before it was deposited in the account. That deposit increased the balance. On the same day, however, there was a check payable to "cash" was cashed by "Joseph J. Cook" for $225 in the bank. That personal check was part of Exhibit No. 31 [Rep. Tr. 258, 259]. In other words, the teller paid "Joseph J. Cook" $225 in cash which was deducted from the amount in the account. The

next thing that happened was that on June 17 a similar check for $80 was cashed by "Joseph J. Cook" at the bank, $80 cash being paid to that person. That was the last transaction that occurred and there was $2.40 left in the account at that time. There were no further transactions. All of the activity in the account was that mentioned above [Rep. Tr. 259-260].

The next witness was Pauline Carlton who worked in the same bank as the Collection and New Accounts Teller [Rep. Tr. 261, 262]. Mrs. Carlton, referring to Exhibit No. 31, opened that particular account for "Joseph J. Cook". He came to the window and she noticed that his right hand was "all wrapped up". It was a gauze covering which went at least to the end of his shirt sleeve. The man told her that he had had an accident so she filled out the back of the card for him and gave it to him to sign. She asked him if he could sign all right with his left hand and he replied, "Oh, yes. I can write as good with one hand as with the other." She then watched him and "he wrote so slow and it was so pretty. I laughed and told him that he should write with his left hand all the time." She then requested him to come in and sign a new signature card when his right arm got better and he said he would. However, he did not come in and do that.

Mrs. Carlton identified appellant as the man who came in on the occasion she described and opened the account [Rep. Tr. 263, 265].

The witness later testified that a government law enforcement officer had shown her four pictures and one of them was Mr. Hanson. The other three pictures were other persons [Rep. Tr. 273].

The next day, November 20, 1958, the government called Mary F. Gray, the clerk in charge of the Poplar Rural Station out of Porterville, Calif., as indicated above. She also identified the defendant as the man who opened postoffice box 451 in either the name of Sidney or Stanley Jones at an earlier date [Rep. Tr. 282-291].

The next witness for the government was Joe McGlocklin, a Claims Adjuster for the Automobile Club. He testified that the defendant, John R. Hanson, was insured by his company at one time [Rep. Tr. 291-292]. Government's Exhibit No. 33 was an accident report showing that appellant had an accident on or about April 28 of 1958, a one-car collision in which he rolled off the road [Rep. Tr. 293].

The next witness was Doctor Ray D. Kohl, an osteopathic physician and surgeon. John Russell Hanson was a patient of his on May 1, 1958. The doctor saw him five times subsequent to that date, on May 5, 6, 19, 26, and June 11. On May 1, appellant came into the doctor's office with a plaster cast on his right forearm and the witness removed it on May 6. Thereafter, on that date he placed a "Yucca board splint padded with cotton on both sides of the arm, bandaged with gauze and adhesive tape" on appellant's right arm. Appellant did not return the splint to the witness.

In the opinion of the witness it was possible for Mr. Hanson to remove the splint from his right arm himself and also to reapply the splint on that arm by himself [Rep. Tr. 304-307]. The witness later testified that he took an X-ray picture and could see that there is a very small fracture on the right arm "on the medial edge of the distal end of the radius" [Rep. Tr. 308-309].

Before the trial had started, on October 24, 1958, counsel for appellant made a motion for the appointment of a handwriting expert under Rule 28 and nominated Mr. David Black who was then present in court as the expert. The Court granted the motion and appointed Mr. Black [Rep. Tr. 19, 20]. Arrangements were then made to give the documents which the government intended to offer in evidence to Mr. Black for his examination before the trial [Rep. Tr. 21]. The government indicated that the documents consisted of application cards, checks, four Treasury checks and ledger cards; about fifty documents altogether [Rep. Tr. 22]. The defense also offered to provide exemplars of Mr. Hanson's handwriting for examination by the court-appointed expert and arrangements were made for the defendant to do so. The Court stated that "the defendant, of course, is not under any compulsion to give an exemplar. He doesn't have to do it, but I understand through his counsel he was offering to do so" [Rep. Tr. 26-28].

During the trial of the case David A. Black, the above-appointed handwriting expert, was called by the government [Rep. Tr. 309]. At that time the exemplars given to Mr. Black by the defendant were marked as Exhibits 34 to and including 49 [Rep. Tr. 310, 311].

Mr. Black testified that all of the handwriting on Exhibits 34 to 49 was placed thereon by the appellant with the exception of certain notations which Mr. Black had made. The writing by appellant appeared in blue ink whereas the notations made by the expert were in black ink. Most of the wording written by appellant on the exemplars involved the names and other written material that appeared on all the other documents which were

placed before the witness. The exhibits were given to Mr. Black to examine on October 27, 1958, and later that afternoon he had the exemplar samples written by Mr. Hanson [Rep. Tr. 311-316].

Mr. Black testified that he had examined Exhibit No. 24, the Post Office application for Taft, California, and Exhibit No. 22, the Post Office application in the name of Walter Adams and had also examined the signatures on the income tax returns, the endorsement of the payees on the reverse side of the Treasury checks, the writing and signatures on the personal checks and the applications for bank accounts [Rep. Tr. 324, 325]. Mr. Black stated that, without comparison with the writings of Mr. Hanson, he had come to the conclusion that the same person wrote all of the signatures on those Exhibits [Rep. Tr. 325, 326]. He reserved for later discussion Exhibit No. 24, the Post Office application at Taft where the signature of applicant appeared as "Peter Hall" [Rep. Tr. 324-326].

Specifically, Mr. Black testified that the signatures of Peter Hall, Sidney Jones, Sidney J. Jones, Stanley Jones, Walter Adams, James Adams, Joseph Cook, Kenneth Cook, Joseph J. Cook, William Hall, William H. Hall, James Jones, Allan Jones and Allan James Jones, on the income tax returns, were all written by the same person. He also testified that the person who had written those signatures was also the person who had written the endorsement signatures on the four government checks. Exhibits 1 through 4, in the names Peter Hall, Walter Adams, Allan J. Jones and Joseph J. Cook [Rep. Tr. 327]. Mr. Black also testified with respect to Exhibits 27,

28, 29 and 31 that the same person who wrote the above-mentioned signatures on the income tax return forms and on the government check endorsements also wrote the name Peter Hall on Exhibit 29 on the pink signature card and on the ledger sheet and in the lower right-hand corner of two checks, one dated June 13 and the other dated June 17, 1958. (In addition to that, Mr. Black reached the conclusion that the same person wrote other wording on the back of the pink signature card.) This person also wrote that signature on the top of the deposit slip dated June 13, 1958, and the general body writing appearing at the top of the deposit slip dated June 13, 1958, and certain figures on the deposit slip. That same person also wrote the body writing on the face of both checks attached to that Exhibit.

With respect to the documents in government's Exhibit 28 relating to "Allan J. Jones," Mr. Black reached the conclusion that the same person who wrote all of the other material on the "Peter Hall" Exhibit No. 29, wrote the signature "Allan J. Jones" on the pink signature card. Mr. Black testified that the same person wrote all the writings appearing on the face of the three checks in Exhibit 28 and a signature appearing in a carbon copy on a pink bank reference request "Allan J. Jones."

Mr. Black gave similar testimony with respect to government's Exhibit 31 in connection with the signature "Joseph J .Cook," particularly with respect to the cancelled bank checks. His opinion with respect to that Exhibit also included certain signatures and other writing on the bank deposit slips.

Similar testimony was also given with respect to the bank records comprising Exhibit No. 27 in the name of "Walter Adams". Mr. Black reached the conclusion that the same person who had written all of the other signatures and writing which he had spoken of in connection with Government's Exhibits 29, 28 and 31, the bank records, had written the signature "Walter Adams" in two places on a bank signature card, as well as other writing on that part of the exhibit. That person also wrote the face of the three checks and a signature and other writing on a deposit slip [Rep. Tr. 324-332].

Mr. Black further testified that the same person who wrote all of the other writing which he had set forth also wrote the signature "Walter Adams" in the lower lefthand corner of the Post Office application card for Box 916 at Tehachapi, California [Rep. Tr. 332, 333].

In other words Mr. Black testified that with respect to the four groups of bank records, all of the writing which he enumerated thereon had been written by one and the same person. He said that it was a "stylized form of writing" and had "some of the appearances of an unnatural writing or a feigned or disguised writing". He stated that in his opinion the writing was written "more slowly than the average throughout" [Rep. Tr. 334, 351, 374] and it is possible for a person to disguise his writing [Rep. Tr. 335]. Mr. Black then wrote his own signature in the presence of the jury in his normal fashion twice and rewrote his signature twice in a manner in which he felt could not be compared to his natural handwriting by another expert [Ex. 52, Rep. Tr. 430]. He testified that the two natural writings could be matched or identified

as having been written by the same person and that the two signatures which were disguised could be identified as having been written by the same person by another handwriting expert. However, he testified that he could not expect another expert to identify the person that wrote the two unnatural writings as the same person who wrote the natural writings. However another expert could give an opinion that it was possible for the same person to have written all four signatures; that it was within his "penmanship ability" [Rep. Tr. 336-338].

Mr. Black then testified that he was not able to identify the writer of the exemplars, that is appellant, on Exhibits 34 through 39 as the writer of any of the stylized writing in the questioned documents. However he testified that in his opinion the handwriting of Mr. Hanson was of sufficient skill that he could have written the stylized samples of the questioned writings [Rep. Tr. 339, 340].

Mr. Black did testify, with respect to the signature "Peter Hall" on the face of the Post Office application, which was Government's Exhibit No. 24, that comparing it with the exemplar writings taken from Mr. Hanson, he reached the conclusion that the same person who wrote the exemplars wrote the signature "Peter Hall" on the face of Exhibit 24 [Rep. Tr. 340].

The witness further stated that although the handwriting on the 1040A forms and the handwriting on the bank exhibits appeared to be different to a layman than the signature "Peter Hall" on Exhibit 24, it was his opinion that the same person could have written all of those signatures and the signature on Exhibit 24 [Rep. Tr. 341].

With respect to the handwriting on the bank exhibits, which Mr. Black had testified were written by the same person, and the signatures on the 1040-A forms, Mr. Black said that it was his opinion that the signatures on the 1040-A forms were written by the same person who wrote the specified writing on the exhibits comprising the bank documents [Rep. Tr. 341, 342].

Mr. Black also reached the conclusion that the same type of writing instrument, a ball pen containing the same identical shade of light purplish blue ink was used to write the indorsement signatures on the back of all four government checks, Exhibits 1 through 4, and on certain of the other documents in the Peter Hall bank papers, Exhibits 29, Allan Jones, Exhibit 28, Walter Adams, Exhibit 27 and Joseph Cook, Exhibit 31. Mr. Black further came to the conclusion that all of the typing on the 1040-A forms were made by an L. C. Smith pica type standard office model machine of the period of manufacture 1911 to 1933. He believed that all of those forms were typed on the same individual machine [Rep. Tr. 342-344].

The witness testified that it is possible physically that a person could write in the typical, shakey, left-handed writing as shown on Exhibits 44 through 49, and yet cultivate and write in a fashion as represented by the stylized writing which he testified to in the other exhibits [Rep. Tr. 346-348].

Mr. Black testified as to the similarity in which the personal checks, which were cashed through the four bank accounts, were written [Rep. Tr. 349, 350].

It was testified that the witness had no way of knowing the extent of appellant's skill in penmanship with his left

hand, except to the extent that the documents which the defendant wished to give him revealed it. In other words, Mr. Black had no way of knowing the actual capabilities that the defendant had in writing with his left hand [Rep. Tr. 371, 372].

Mr. Black was excused temporarily and the next witness was Laurence W. Sloan, an examiner of questioned documents employed by the Los Angeles Police Department [Rep. Tr. 383, 384]. His testimony primarily involved the income tax returns, Exhibits 5 through 18, the four groups of bank exhibits and the Treasury checks, Exhibits 1 through 4. Mr. Sloan testified, in effect, that principally with respect to the signatures "Peter Hall", "Allen J. Jones", "Walter Adams" and "Joseph J. Cook", that the writings were all made by the same person [Rep. Tr. 385, 387].

He also included in his opinion the writing of the name "Walter Adams" in Exhibit 22, the Post Office application [Rep. Tr. 387].

He further testified that the style of the writing he had referred to was an "affectation", a kind of handwriting that was not taught in the schools of the United States [Rep. Tr. 388].

Mr. Sloan testified that it is customary for a person who is not ambidextrous, when he writes with his left hand, to produce a very poor result. However, depending upon the ultimate gain in mind, it is possible for such a person, through practice, to improve that left-handed writing. Further such a person could then be capable of writing two kinds of left-handed writing, good and poor [Rep. Tr. 391, 392].

He also testified that after having examined the exemplars given by the defendant and the stylized writing on the bank exhibits, the 1040-A forms and the payee's indorsement on the checks, that the person who wrote the exemplars was capable of writing the questioned hand writing [Rep. Tr. 394, 396].

Mr. Sloan then testified with respect to Government's Exhibit No. 24, the Post Office application containing the signature "Peter Hall" in the middle of the form. He stated that it was his "specific and unqualified opinion that the person who wrote the name Peter Hall, as it appears in the middle portion of the front part of Exhibit 24, is the same person responsible for the right-handed exemplar writing on the yellow sheets of paper beginning with the Exhibit No. 34" [Rep. Tr. 397, 398]. In comparing the name "Peter Hall" on Exhibit 24 with the stylized writing of the name "Peter Hall" in the bank exhibits and on the reverse side of the checks, he gave the qualified opinion that the person who wrote the signature "Peter Hall" on the exhibits bearing that signature, could have written the kind of writing of "Peter Hall" on Exhibit 24 and "that person could certainly be the person doing the right-handed writing of Mr. Hanson" [Rep. Tr. 398, 399].

On November 21, 1958, Mr. Black resumed his testimony. After he started and while he was on the stand the defendant made out some exemplars in the presence of the jury which were marked as defendant's Exhibit B and C. Government counsel then requested the defendant to make some other writing, very slowly, in the presence of the jury. This was done and it was marked as Government's Exhibit No. 51 [Rep. Tr. 412-419].

Mr. Black then compared the Government exhibits comprised of the bank documents, 27, 28, 29 and 31, and testified that it was possible that Mr. Hanson could have written the material on the four groups of papers [Rep. Tr. 424-426]. He further testified after having looked at the exemplars made out by the defendant in the presence of the jury, that the signature "Peter Hall" on Exhibit No. 24, the Post Office application, was representative of the defendant's natural and normal right-handed handwriting [Rep. Tr. 427]. He further said that it was possible the person who wrote the "Peter Hall" on Exhibit 24 also wrote the writing on the bank exhibit relating to "Peter Hall" [Rep. Tr. 428, 429].

On November 25, after the Government had rested, the appellant put on his case. The Controller for Capitol Records at Los Angeles testified with respect to two time cards for employees, one for Beulah Hanson and one for Mabel Parks. They were marked as defendant's Exhibits D and E. Beulah Hanson then took the stand and testified that she was appellant's wife. She testified in effect that she and her husband were working on their house during the early part of December 1957 and certain bills were marked as defendant's exhibits in connection with the purchase of paint, shellac, etc. [Rep. Tr. 447-450].

Mrs. Hanson only testified as to one other occasion, Friday, June 13, 1958. She testified that her husband had taken her to work on that day. "He wanted to go fishing that night so he wanted the car" [Rep. Tr. 451]. (The previous witness had testified that her time clock showed Mrs. Hanson had clocked in at work on Friday, June 13, 1958 at 18 minutes after 3 [Rep. Tr. 443, 444]).

On cross-examination Mrs. Hanson testified that there were times when her husband was gone from home [Rep. Tr. 454]. And that on some occasions he had slept in his car outside of the Vagabond Restaurant where he worked in 1958 up to April 11, 1958 [Rep. Tr. 455]. On April 14, 1958, her husband left on a trip and was gone two or three weeks. When he left she did not know where he had gone and she did not hear from him until he was on the way home and he had an automobile accident on that occasion [Rep. Tr. 457, 458]. Her husband was largely unemployed from April 11, 1958 until he went to Yellowstone National Park to work as a cook on June 18, 1958 [Rep. Tr. 457-459].

The next witness for the defense was a job dispatcher for the Cooks Union in Los Angeles. He claimed that on June 17, 1958 appellant was interviewed by a Chef who came in to hire a couple of cooks in the Union [Rep. Tr. 460-462]. However on cross-examination he stated that the appellant was in the Union just before lunch, about eleven o'clock A.M. appellant then left before noon. He had the record of two other men he saw that day but had no records relating to seeing appellant on the same date [Rep. Tr. 465-467].

The next witness was Mabel Parks who also worked at Capitol Records and was a friend of the Hansons. She testified that she had seen the appellant on June 13, 1958 at his house. She claimed to have seen him between ten

o'clock in the morning and the time she was on her way to work [Rep. Tr. 470-473].

There were no further witnesses for the defense which rested after the last witness testified [Rep. Tr. 474].

Argument was then made by counsel for the Government and the defendant. The parts of the argument which are pertinent to an issue in the opening brief will be set forth in the argument herein.

On December 5, 1958, after the defendant had been convicted on November 28, 1958, he was sentenced by the Court. The Court commented that the probation report indicated the defendant had served a term in the State Prison at Huntsville, Texas, for assault with intent to commit robbery and that he had served a term in the State Prison in Arizona for grand theft. Appellant was also then on probation for forgery of a government check, which conviction occurred in 1955 before Judge Clark of the United States District Court for the Southern District of California [Rep. Tr. 613, 614]. After the Court stated that the "circumstances of the case are aggravated" and "if the Court imposed the maximum penalty it would run to in excess of 100 years", the defendant was sentenced to a total of approximately 28 years on 21 counts of the indictment.

IV.
ARGUMENT.

(1) The Court Lacks Jurisdiction on Appeal.

The record shows conclusively that the Judgment and Commitment was filed on December 5, 1958, the same day sentence was imposed on appellant [Clk. Tr. 26]. It is obvious that the Judgment and Commitment was actually entered on December 8, 1958 since the notation "12/8/58" immediately follows the designation of the terms of the Judgment. All of this was in typewriting. In other words, the entry of the Judgment was an accomplished fact on December 8, 1958. On that date the time for the filing of the Notice of Appeal commenced to run under the provisions of Rule 37(a)(2) of the Federal Rules of Criminal Procedure, which provides that "an appeal by a defendant may be taken within 10 days after entry of the Judgment or order appealed from, * * *"

Subsequently, on December 12, 1958, when appellant still had approximately 6 days within which to file his Notice of Appeal from the date of the entry of the Judgment on the Criminal Docket Entries, the Court made an order that the Judgment be entered on December 15, 1958. However, as indicated above, the Judgment had already been entered on the 8th. No order was attempted to be made invalidating the prior date of entry. It was not a purported *nunc pro tunc* entry, "now for then". If it had been, it would not have been valid as the proper function of such orders is to correct the record so it speaks the truth, or to show a previously unrecorded order.

Wilson v. Bell, 137 Fed. 716 (6 Cir., 1943).

The Notice of Appeal was filed by appellant on December 24, 1958 [Clk. Tr. 27]. This date was obviously outside of the ten day period from December 8, 1958, the true date of entry.

Thus, it appears that this court may not have jurisdiction to consider the appeal because of a late filing of the Notice.

Counsel for appellee has been unable to find any case which involves a situation similar to the above events with respect to the filing of the Notice of Appeal. However, it is axiomatic that the time limitation contained in Rule 37(a)(2) is mandatory and jurisdictional. A jurisdictional defect results when the appeal is filed too late and the case must be dismissed.

United States v. Froehlich, 166 F. 2d 84 (2d Cir., 1948);

Wagner v. United States, 220 F. 2d 513 (4th Cir., 1955).

In the *Wagner* case, the Court remarked:

"Appellant is not hurt by the dismissal, however, as we have examined the record on appeal and find that the points on which he relies are without merit."

See also:

United States v. Isabella, 251 F. 2d 223 at 225 (2d Cir., 1958).

In *Richards v. United States,* 192 F. 2d 602 (Dist. of Col., Ct. of App., 1951) the Government contended that the Court of Appeals lacked jurisdiction because the appeal was not taken "within ten days after entry of the judgment or order appealed from * * *", as required by Rule 37(a)(2). In that case the Criminal Docket of the

District Court contained two entries, one showing June 16, 1950 as the date of sentence and the other showing "June 19, 1950—Judgment and commitment of 6/16/50, filed. * * *" The Notice of Appeal was filed on appellant's behalf on June 27, which was more than ten days after June 16. The Government contended that June 16 was the crucial date. The Notice of Appeal was filed within ten days after the 19th.

The Court stated that the Notice of Appeal was timely and went on to say:

> "The expression 'entry of the judgment', as used in Rule 37(a)(2), is not defined or explained by the Criminal Rules, nor have we found any decisions interpreting the rules in this regard. * * * The formal document reflecting the judgment and commitment in the present case, signed by the Judge, begins with the recital 'On this 16th day of June, 1950 * * * it is adjudged * * *,' and bears no other date. The Judge may well have signed it on that day; perhaps we may even presume that he did so. June 16th was, of course, the day on which Richards was sentenced in open court. But the clerk did not make any record of the signed judgment on the criminal Docket until June 19th, when he made the entry 'judgment and commitment of 6/16/50 filed. * * *' We think that this was 'the entry of the judgment' of which Rule 37(a)(2) speaks. Decisions of the Supreme Court prior to the promulgation of the Rules, though not controlling, lend support to this view. * * * Other persuasive authority, though likewise not strictly in point, looks in the same direction. * * *"

The Court shortly thereafter remarked that the conclusion made was favorable to the remedy of appeal "a remedy we are not inclined to undervalue".

This Honorable Court in *Crow v. United States,* 203 F. 2d 670 (9th Cir., 1953), stated at page 671:

> "Rule 37(a)(2) of the Federal Rules of Criminal Procedure provides: 'An appeal by a defendant may be taken within ten days after entry of the judgment or order appealed from, * * *' Hence the period within which appellant might have taken a valid appeal from the order here appealed from was ten days after entry of the order, which is to say, ten days after December 11, 1951".

The date of December 11, 1951 was, according to Judge Mathews, the date that the order involved was entered. That appeared from the Supplemental Record in the case.

It thus appears fairly certain that the word "entry" in the Rules means the date on which the clerk actually enters the Judgment and Commitment in the docket entries. In this case it appears that the entry was made on December 8, 1958, although the Clerk endeavored to change the date later in ink, pursuant to the Court's order of December 12, 1958. However, the change which was made could not alter the fact that the entry had actually been made on December 8, 1958; and not on December 15, 1958.

This Court again considered the entry of Judgment in *Lee v. United States,* 238 F. 2d 341 (9th Cir., 1956) and based its decision on the fact that the Supplemental Record showed the true date of entry, rather than the date shown as a notation on the Judgment itself.

In writing the opinion Judge Mathews stated:

> "Thereupon, on January 11, 1956, the District Court rendered a judgment sentencing appellant to be imprisoned for five years and to pay a fine of $10,000 and the cost of prosecution. The judgment was filed and entered on January 12, 1956. * * *"

In a footnote to that statement the following is shown:

> "Appended to the judgment is the following notation: 'Entered January 13, 1956'. Actually, however, the judgment was entered on January 12, 1956. This appears from the supplemental record filed here on September 20, 1956."

It is clear that the Court in the *Lee* case ignored the notation on the Judgment of the date of entry to consider the true date of entry as it appeared from the Supplemental Record. It is felt that the court should do likewise here and consider the true date of entry as December 8, 1958. If such be the case, it would follow that the time for filing the Notice of Appeal commenced to run from the date of December 8, 1958 and not from December 15, 1958.

Appellee calls the court's attention to the case of *Spriggs v. United States,* 225 F. 2d 865, one of the few cases to be found in which an entry has been set aside. However, in that case the reason for setting the entry aside was apparently "to conform to the true pronouncement". Such was not the case in the within matter.

The case of *Rosenberg v. Heffron,* 131 F. 2d 80, at p. 82, (9th Cir., 1942) contains some language which may be of interest to this Court. However that case was a civil matter involving an appeal in a bankruptcy case. Judge Mathews writing the opinion held that an appeal was in time where an order was noted in the Docket on May 5, 1942, and the appeal was taken on June 4, 1942. This was true since the Clerk's pre-dated notations did

not constitute the entry of the order of affirmance. The Court stated:

> "We conclude that in bankruptcy cases, as in civil actions generally, the notation of a judgment, order or decree in the Docket constitutes the entry thereof. The order here appealed from . . . the order affirming the Referee's order of May 15, 1941 . . . was noted in the Docket on May 5, 1942. That notation constituted the entry of the order.
>
> "On June 10, 1942 . . . 36 days after the order was entered and six days after this appeal was taken . . . the following notation was made in the Docket: 'Apr. 20 Fld. Memo. of Conclusions. Ent. Min. Ord. Conf. Referee Ord. of 5-15-41. Counsel to Prep. Order'. This pre-dated notation did not constitute the entry of the order; for, as shown above, the order was entered long before the pre-dated notation was made."

The record on this jurisdictional point contains no explanation as to why the Court made the order of December 12, 1958, endeavoring to have the Judgment entered on December 15, 1958. The appellant still had a number of days from December 12, 1958 within which to file his Notice of Appeal and there is no provision in Rule 37 regarding extensions of time to file Notices of Appeal. Rule 45 does not apply to a Notice of Appeal. The order of the 12th was not an attempt to make a correction of a judgment, *nunc pro tunc* as in the case *Bledsoe v. Johnston,* 154 F. 2d 458 (9th Cir., 1946), nor could it have been done for the purpose of delay because the matter was under submission to the Court as in *Taylor v. Walker,* 6 F. 2d 577 (4th Cir., 1925).

It is thus submitted that when there is no valid reason shown of record for the making of such an order, such

as the correction of error, the actual date of entry of the Judgment should be used for computing the time within which a Notice of Appeal could be filed. Otherwise, the time for filing a Notice of Appeal could be extended indefinitely, which would be contrary to the terms and policy of the rule which strictly limits the time for filing appeals.

Ordinarily the Government would be constrained to maintain a view "in consonance with an approach which is favorable to the remedy of an appeal, *Richards v. United States,* 1951, * * * 192 F. 2d 602 * * *", *Chambers v. District of Columbia,* 194 F. 2d 336, but it is difficult to see where such a view is warranted here where the Court's order attempted to un-do something already done, in a situation where there was no inadvertence or correction of the terms of the judgment or of the Clerk's entry itself to be made.

(2) No Error Was Committed by the Trial Court by the Method Used in Exercising Peremptory Challenges.

The Supreme Court of the United States has approved the identical method of exercising peremptory challenges used by the trial court in this case. In *Pointer v. United States,* 151 U. S. 396, the panel of the petit jury was called and the jurors were examined as to their qualifications. Thirty-seven were found to be qualified and the defendant and the government were then each furnished with a list of the thirty-seven jurors selected. The parties were required to make their respective challenges, twenty by the defendant and five by the government, the remaining first twelve names not challenged to constitute the trial jury. The defendant at the time objected to this way of selecting a jury on four grounds: First, because it

was not according to the rule prescribed by the laws of Arkansas; second, because it was not the rule practised by common law courts; third, because the defendant could not know the particular jurors before whom he would be tried until after his challenges had been exhausted; fourth, because the government did not tender to the defendant the jury before whom he was to be tried, "but tendered seventeen men instead of twelve, and made it impossible for defendant to know who the twelve men before whom he was to be tried were until after his right to challenge was ended."

The Supreme Court affirmed the judgment below stating: "We perceive no error in the record to the prejudice of the substantial rights of the plaintiff in error."

The Court held that the objection the jurors were not selected in the particular manner prescribed by the laws of Arkansas could not be sustained. At page 407 the Court stated:

> "* * * but Congress has not made the laws and usages relating to the designation and empanelling of jurors in the respective state courts applicable to the Courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard. [Citing cases.] In the absence of such a rule or order (and no such rule or order appears to have been made by the court below), the mode of designating and empanelling jurors for the trial of cases in the Courts of the United States is within the control of those Courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the federal principles of criminal law to be essential in securing impartial juries for the trial of offences."

The Court went on to say at page 408 that there was no claim the jurors for general service during the term at which the defendant was tried were not selected in accordance with the law. The complaint was only that the particular mode in which the trial jury was impaneled was illegal. It was true that that mode was not in conformity with the laws of Arkansas but that objection could not avail the appellant. The Court then stated that the inquiry must thus be whether the jury was organized in violation of any federal principle of criminal law relating to the subject of challenges.

The Court asked:

> "Where his rights in these respects impaired or their exercise embarrassed by what took place at the trial? We think not. * * * Both the accused and the government had ample opportunity, as this examination progressed, to have any juror who was disqualified rejected altogether for cause. A list of all those found to be qualified under the law, and not subject to challenge for cause, was furnished to the accused and to the government, each side being required to make their challenges at the same time, and having notice from the court that the first twelve unchallenged would constitute the jury for the trial of the case.
>
> * * * *
>
> "Was the prisoner entitled, of right, to have the government make its peremptory challenges first, that he might be informed, before making his challenges, what names had been stricken from the list by the prosecutor? In some jurisdictions it is required by statute that the challenge to the juror shall be made by the state before he is passed to the defendant for rejection or acceptance. Such is the law of Arkansas, and the court below was at liberty to pursue that

method. * * * And such is regarded by some courts as the better practice, even where no particular mode of challenges is prescribed by statute. * * * But as no such provision is embodied in any act of Congress, it was not bound by any settled rule of criminal law to pursue the particular method required by the local law * * * but the general rule is, that where the subject is not controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court."

At page 411 of the opinion the court further stated:

"We cannot say that the mode pursued in the court below, although different from that prescribed by the laws of Arkansas, was in derogation of the right of peremptory challenge belonging to the accused. He was given, by the statute, the right of peremptorily challenging twenty jurors. That right was accorded to him. Being required to make all of his peremptory challenges at one time, he was entitled to have a full list of jurors upon which appeared the names of such as had been examined under the direction of the court and in his presence, and found to be qualified to sit in the case. * * * The right of peremptory challenge this court said, * * * is not of itself a right to select, but a right to reject, jurors."

At page 412 it was held:

"It is true that, under the method pursued in this case, it might occur that the defendant would strike from the list the same persons stricken off by the government. But that circumstance does not change the fact that the accused was at liberty to exclude from the jury all, to the number of twenty, who, for any reason, or without reason, were objectionable to him. *No injury was done if the government united*

with him in excluding particular members from the jury. He was not entitled, of right, to know, in advance, what jurors would be excluded by the government in the exercise of its right of peremptory challenge. He was only entitled, of right, to strike the names of twenty from the list of impartial jury men furnished him by the court" (emphasis ours).

In conclusion, the court said:

"Thus, in our opinion, the essential right of challenge to which the defendant was entitled was fully recognized. And there is no reason to suppose that he was not tried by an impartial jury. The objection that the government should have tendered to him the twelve jurors whom it wished to try the case, or that he was entitled to know before making his challenges the names of the jurors by whom it was proposed to try him, must mean that the government should have been required to exhaust all of its peremptory challenges before he peremptorily challenged any juror. This objection is unsupported by the authorities, and cannot be sustained upon any sound principle."

When the case of *Avila v. United States,* 76 F. 2d 39, (9th Cir., 1935) was decided, there was a rule of the court involved which is no longer in existence. Thus the language of the *Pointer* case at page 407 is particularly applicable:

"* * * in the absence of such a rule or order, (and no such rule or order appears to have been made by the court below) the mode of designating and impaneling jurors for the trial of cases in the Courts of the United States is within the control of those Courts * * *"

Further, it is clear that under the holding of the Supreme Court of the United States, the United States District Courts are not restricted in the method chosen for exercising peremptory challenges by the method contained in any particular state law. "* * * the order in which peremptory challenges shall be exercised is in the discretion of the court."

It is to be noted that appellant's brief states:

> "* * * Appellant was forced to drop two challenges because he was refused knowledge of the Government's challenges, despite his request to see them * * * it resulted in Appellant being forced to withdraw a challenge to Harry Green * * * who later became the foreman of the jury * * *."

However, it is to be noted that the reason defense counsel had to remove two of his peremptory challenges was that he had challenged twelve on the list, whereas he was only allowed ten [Rep. Tr. 39-B, 39-C]. Rule 24(b) of the Rules of Criminal Procedure provides that the government is entitled to six peremptory challenges and the defendant to ten. Only when there is more than one defendant may the court allow additional peremptory challenges.

It is further of interest to note that there was no objection by trial counsel to the method of exercising the peremptory challenges. About all he stated with respect to the selection was "if two of them coincide with the peremptory challenges made by the government, perhaps it can be disposed of in that way" [Rep. Tr. 39-B].

As Judge Alexander Holtzoff stated in an article "A Criminal Case in the Federal Court" which is contained in the volume of the Federal Rules of Criminal Procedure,

"* * * a defendant is entitled to a fair and impartial jury and not necessarily a favorable jury."

See also:

Stilson v. United States, 250 U. S. 583, at 585, 586;

United States v. Wood, 299 U. S. 123, at 145.

In *United States v. Macke,* 159 F. 2d 673 (2 Cir., 1947), the method of exercising peremptory challenges was questioned on appeal. The court stated at page 765:

> "The right to exercise peremptory challenges is not a constitutional right. Courts are not limited to any particular method of providing for their exercise (citing cases)."

The system of exercising peremptory challenges in *United States v. Keegan,* 141 F. 2d 248 (2 Cir., 1944) (reversed on other grounds, 325 U. S. 478) resulted in the government exercising the last peremptory challenge with respect to a juror who was excused. The box was then filled by drawing another jury and the jury as thus constituted was formed. Before the trial began defendant complained that the juror who had been drawn in place of the last one excused by the government was not satisfactory to them and that they had had no opportunity for challenge. "In other words, they maintained that they should have been allowed to exercise their last challenge after the government's challenges had been exhausted."

The court held at page 255:

> *"In Pointer v. United States,* 151 U. S. 396, 410, * * * a unanimous court, speaking by Justice Harlan, enunciated the general rule that where, as in the

case at bar, 'the subject is not controlled by statute, the order in which peremptory challenges shall be exercised is in the discretion of the court.' In *Lyon v. State,* 116 Ohio St. 265, 155 N. E. 800, the Supreme Court of Ohio, relying on *Pointer v. United States, supra,* sustained the very method of exercising challenges which the trial judge adopted in the case at bar. In *Commonwealth v. Piper,* 120 Mass. 185, the court said that 'the statutes conferring and defining the right of challenge in capital cases contain no provision as to the order and time in which the right shall be exercised by the government or by the defendant * * *. There is no general rule of court upon the subject, and all directions as to the time when and the motive which either party shall challenge, except so far as regulated by the statutes, like other matters affecting the proper conduct and order of the trial, are within the discretion of the court.' See also: *Philbrook v. United States,* 8 Cir., 117 F. 2d 632, 635, certiorari denied 313 U. S. 577, * * *. The appellants were deprived of no right to exercise one of the peremptory challenges given them by statute, but were merely required to exercise their challenge at a particular time. We are clear that the court in adopting the alternating system infringed no legal right of the defendants and that the jury was properly selected."

The rights of a defendant in choosing a jury are clearly defined in *Kloss v. United States,* 77 F. 2d 462, at p. 463:

"Moreover, the courts have uniformly said that the right of a defendant in picking a jury trial is bottomed not on selection, but on rejection * * * no defendant has the right to have any particular juror or jurors on the trial panel. * * * His sole right to reject or object ends when a fair and impartial panel

has been chosen. It is nowhere contended by appellant that the jury which tried him was unfair, impartial or prejudiced. *Pointer v. United States,* 151 U. S. 396, 412, * * * and if it had been, as to component members, he could by exercising his peremptory challenges, which he did not exhaust, have thus rid himself of those to whom he objected * * * it is persuasive, though not controlling, that the rule in Arkansas seems to be in accord * * *."

See also:

Radford v. U. S., 129 Fed. 49, at p. 53 (2 Cir., 1904).

In *Philbrook v. United States,* 117 F. 2d 632 (8 Cir., 1941) the court held at page 635, 636:

"The Sixth Amendment to the Constitution of the United States provides that in all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury. There is nothing in the Constitution which requires Congress to grant peremptory challenges to the accused, or which limits the court to any particular method of securing to an accused the right to exercise the peremptory challenges which Congress grants him. * * * The order in which peremptory challenges must be exercised is within the discretion of the trial court. *Pointer v. United States,* 151 U. S. 396, 410 * * * it can require the government to exercise its peremptory challenges first; but it is not required to do so * * * the only limitations upon a court of the United States in impaneling a jury is that the system used must not be one 'that prevents or embarrasses the full, unrestricted exercise by the accused of his right of peremptory challenge', and must not be inconsistent with any settled principle of criminal law, or interfere with the selection of a partial jury.

"The court below was free to follow any method in impaneling a jury which did not impair the free exercise by the defendants of their right to challenge. The statute gave to the defendants the right to challenge peremptorily ten jurymen. That right is the right of rejection, and not of selection * * * the order of challenging was within the discretion and control of the trial court, and there was no abuse of discretion * * * there is no claim that the jury was in fact unfair or impartial."

See also:

Hall v. United States, 168 F. 2d 161 (Ct. of App., Dist. of Col., 1947), at p. 164.

A defendant's right to a particular juror was again discussed in *Watts v. United States,* 212 F. 2d 275 (10th Cir., 1954). At page 279 the court held:

"The great weight of authority is that a defendant is not entitled to any particular jury so long as a fair and impartial jury of qualified jurors is selected and a defendant is not deprived of his right to exercise his peremptory challenges. In *United States v. Chapman* (10th Cir. 1958), 158 F. 2d 417, 419, we said, '* * * An interested party to a lawsuit has no vested right to any particular juror'. The trial court is vested with a considerable discretion in the selection of a jury. Since no contention is made that the juror selected to sit in the place of La Rock was not qualified, appellant suffered no prejudice by his dismissal from the jury. *He had what he was entitled to, a fair and impartial jury of competent and qualified jurors'* (emphasis ours).

See also:

United States v. Puff, 211 F. 2d 171, at 184, 185 (2d Cir., 1954).

To the same effect, see:

United States v. Costello, 255 F. 2d 876, (2d Cir., 1958),

where the court at page 884 said that the crucial question was whether the appellant had been tried by a fair and impartial jury and that the exercise of peremptory challenges is a rejective, rather than a selective process of which the appellant has no right to complain, citing the *Hall* and *Puff* cases, *supra.*

As early as 1912, it was held that the order in which peremptory challenges shall be exercised is a matter within the discretion of the trial court. In so holding, the court in *Emanuel v. United States,* 196 Fed. 317, at 321 cited the case of *Pointer v. United States,* 154 U. S. 396, *supra.*

See also:

Simpson v. United States, 184 Fed. 817, at 819 (8th Cir., 1911).

Thus it is respectfully submitted that the trial court below exercised his sound discretion in choosing the particular manner of exercising peremptory challenges which was used in the selection of the jury. The defendant was given the right to reject ten jurors allowed to him under the Federal Rules of Criminal Procedure. He was entitled to nothing further than his constitutional right to a fair and impartial jury. There is no complaint in this case that the jury was not actually fair and impartial as constituted.

(3) No Error Was Committed by the Trial Court in Denying Motion to Exclude Witnesses.

It is of interest to note that in making this point on appeal appellant has claimed that "prejudicial" error was committed by the trial court in failing to exclude witnesses. However he has failed to set forth in what respect any prejudice was committed.

At any event, it is clear that the power to put witnesses under the "rule" is discretionary with the trial court. This Honorable Court has so held in the case of *Charles v. United States,* 215 F. 2d 831 (9th Cir., 1954):

> "The prime purpose of putting witnesses under the rule is to prevent them from shaping their testimony to match that given by other witnesses in their hearing. In this case, so far as the record shows, the District Court had no reason to believe or suspect that any witness would shape his testimony to match that given by any other witness nor does it appear from the record that any witness did so shape his testimony.
>
> "It is true that some of the witnesses gave testimony which corroborated testimony given by some of the other witnesses, but it does not follow that the corroborating testimony was shaped to match the corroborated testimony, or that the District Court abused its discretion in refusing to put the corroborating witnesses under the rule."

See also:

Witt v. United States, 196 F. 2d 285 (9th Cir., 1952).

To a similar effect, see: *Mitchell v. United States,* 126 F. 2d 550 (10th Cir., 1942), at page 553:

> ". . . and the Court's discretion will not be disturbed in the absence of a manifest prejudice resulting from the presence of witnesses during the trial of the case. . . . There is nothing in the record which tends to indicate that the defendant was prejudiced or the jury was influenced by the refusal of the Court to exclude witnesses from the Courtroom during the trial, and there is no error in the Court's refusal to invoke the rule."

A good discussion of the "rule" is contained in *United States v. Postma,* 242 F. 2d 488 (2d Cir., 1957). The Court there said it was better to leave the decision to the trial court rather than to adopt a rigid rule requiring exclusion of all witnesses as a matter of right.

> "Not infrequently justice may be better served, we think, by allowing witnesses to remain in the courtroom than by relegating them to the public corridors of the court house, where they may be exposed to the possible importunities and threats of hostile parties. We do not overlook Wigmore's advocacy of the rule of exclusion as a right. 6 Wigmore, Evidence, Sec. 1839 (3rd Ed., Supp. 1955). Nevertheless we adhere to the principle underlying the discretionary rule prevailing in the Federal Courts. . . . we hold that no abuse of discretion has been shown."

The Government has set forth in this brief a statement of the testimony which was given by all of the witnesses in the case and it is obvious that the eye witness' statements involved different times, places and events. It is further clear that the testimony of the two experts, examiners of questioned documents, played an important part

in the pinpointing of the appellant as the person who had perpetrated the entire series of transactions.

Appellant does not claim that the District Court had any reason to believe that the Government's witnesses would shape individual testimony to match that of other witnesses. Further, as the record of the trial shows, there is absolutely no showing that this actually happened. Certain Government witnesses, Mrs. Gray, the Postmaster, Mr. Evans, the banker and Mrs. Carlton, who worked at another bank, identified appellant as the person with whom they dealt in their respective transactions. However, other postmasters and bank personnel were only able to give a description of the person involved and so stated. In other words, the persons who knew him to be the person with whom they dealt, said so. Those who could not identify him, said so. There is nothing in the evidence which shows that they were other than absolutely fair and honest in relating the events in which they had participated. Each one testified to a different situation, which Government counsel had previously stated she believed would be the case.

Although the testimony of the various persons concerned with the renting of post office boxes and the opening and processing of the bank accounts was a key point in the Government's case, it is obvious that the testimony of the handwriting experts had much to do with the defendant's conviction. Appellant claims in his brief that one expert said he was not able to identify appellant as the writer of the returns, checks, etc., [Rep. Tr. 339] and that the other one came to the opinion that the exemplars, returns and checks were not written by the same person

[Rep. Tr. 393]. However those statements are taken out of context of the *entire* testimony of the experts. The point of Mr. Black's statements in which he said he was not able to identify the writing of the exemplars, appellant, as the writer of any of the "stylized" writing in the questioned documents, was graphically illustrated by the illustration which he gave to the jury. Mr. Black wrote two of his own signatures in his natural writing and two signatures in unnatural writing. Although he had written all four signatures he stated that it would be impossible for another expert, who had not seen him do the writing, to state that the person who wrote the natural writings had also written the unnatural writing. Further Mr. Black stated that the handwriting of the appellant as shown in the exemplars was of sufficient skill so that he *could have written* the stylized samples of questioned writing [Rep. Tr. 340]. Mr. Sloan's testimony was to the same effect. Mr. Sloan also stated that the person who wrote the exemplars was *capable* of writing the stylized items [Rep. Tr. 394, 395].

Also in connection with the handwriting evidence, it is of great importance to note that, on the post office application in the name of "Peter Hall", both experts testified without qualification that that signature was the same as the natural handwriting of appellant. Thus, it was clear that appellant had "slipped up" and placed his own natural writing on one of the significant documents involved in the entire series of fraudulent transactions, which documents contained the stylized writing which the experts testified had all been written by the same person.

It is clear that the court did not abuse its discretion in refusing to exclude the witnesses in this case. Further,

absolutely no prejudice has been pointed out by appellant or shown in the record as a result of the presence, if any, of witnesses in the courtroom.

(4) Forgery and Uttering of Forged Checks Was Proven on Counts Two, Three, Seven, Eight, Twelve, Thirteen, Twenty and Twenty-one Under Title 18, U.S.C. Sec. 495.

Appellant states at page 18 of the opening brief that "the Government's evidence is that the Joseph J. Cook who filed the return and to whom the check was sent was the Joseph J. Cook who endorsed the check and uttered it."

Of course, it must be remembered that the Government's evidence showed that all of the documents involving the other names, Peter Hall, Sidney Jones, Sidney J. Jones, Stanley Jones, Walter Adams, James Adams, Joseph Cook, Kenneth Cook, Joseph J. Cook, William Hall, William H. Hall, James Jones, Allan Jones and Allan James Jones, Government checks being issued for four of the names, contained "stylized" writing *by the same person*. That evidence, together with all the other facts proven in the case, showed that the names on the four Government checks were fictitious names. Further, there is no evidence that the appellant used the various names involved in the case except to perpetrate the offenses charged in the indictment. In other words, he was "known" only for a limited, dishonest purpose by those names. One could not reasonably say that a defendant was using his true or "known" name on a forged check, when such name was used only for the limited purpose of using the checks.

The law which applies to the within matter, where the evidence showed appellant caused the issuance of a check

to a fictitious person by the filing of a false return in the name of the same person, should not be materially different from a case where checks were stolen from a bank which bore the name of no payee. In *Rowley v. United States,* 191 F. 2d 949, (8th Cir., 1951) the latter situation had occurred. After the checks came into the possession of the defendant he placed in his own handwriting thereon for the name of the payee, "Len E. Allen". That name was a fictitious one. In other words, there the defendant had received checks which had been duly signed and issued but which did not bear the name of a payee. He filled in the name of fictitious parties. Here, the checks were also duly signed and issued but the appellant had caused the checks to be issued in the names of fictitious payees. The only difference in the two cases was that one set of checks was received with the names of no payees, which the defendant filled in with fictitious names, and in this case the defendant caused the checks to be issued in the names of fictitious payees. In the *Rowley* case the Court affirmed the judgment which was based on a charge of three counts of violations of the National Stolen Property Act, Section 2314, Title 18, United States Code.

Of some pertinence herein is the case of *Buckner v. Hudspeth,* 105 F. 2d 393 (10th Cir., 1959) in which the Court stated:

> "Furthermore, to constitute forgery the name alleged to be forged need not be that of any person in existence. It may be wholly fictitious if the instrument is made with intent to defraud and shows on its face that it has sufficient efficacy to enable it to be used to the injury of another."

In *Milton v. United States,* 110 F. 2d 556 (Ct. of App., Dist. of Col., 1940) it was held at page 560:

> "It is enough if the forged instrument be apparently sufficient to support a legal claim and thus to effect a fraud. It is well settled that the signing of a fictitious name, with fraudulent intent, is as much a forgery as if the name used was that of an existing person. *The public mischief, i.e., the legal tendency to defraud, is equally great in either event.*" (Emphasis ours.)

The case of *Greathouse v. United States,* 170 F. 2d 512 (4th Cir., 1948), cited by appellant at page 17 of his brief, is not applicable. It should be noted that the defendant signed the checks involved in that matter in his own name, "Woodruff Motor Sales, Inc., J. W. Greathouse." The Court at page 514 held that the charge of forgery was not sustained by the fact that the defendant, with intent to defraud, drew the checks *in his own name* upon a bank in which he had no funds. The fact that he added the words "Woodruff Motor Sales, Inc." was immaterial.

> "It is true that the authorities hold that forgery may exist even if the name used be an assumed or fictitious one; . . . But this rule is properly applicable only when the writing is issued as the writing of the fictitious individual and not when the name is signed by the defendant himself under the pretense that he has been authorized by an existing person to sign his name. When the writing is not passed off as the writing of another, it is immaterial whether the person it purports to designate is real or fictitious."

Likewise the case of *United States v. Greever,* 116 Fed. Supp. 766 (Dist. of Col., 1953), cited in appellant's brief at page 18, is not controlling. Even so, the Court there stated at page 756 that: "And the signature of a fictitious name, with fraudulent intent, is as much a forgery as if the name used was that of an existing person."

In *Hubsch v. United States,* 256 F. 2d 820 (5 Cir., 1958), also cited in the Appellant's Brief, appellant received treatment at a hospital representing himself as being "Alfred Weinstein." In payment he gave a check signed "A. A. Weinstein" drawn on a bank in another state. It was the basis of a charge under Section 2314 of Title 18, United States Code. A second such check transaction occurred in connection with the purchase of jewelry where he represented himself as Weinstein, a Mason. Both checks were returned with the notation "unable to locate." The court stated:

> "The second contention concerning the indictment is that no offense was alleged because it charged that appellant 'alias A. A. Weinstein', caused the interstate transportation of two falsely made and forged checks signed 'A. A. Weinstein' knowing the same to have been falsely made and forged. The argument is that an alias is, by definition, a name by which a person is 'otherwise called', so that the making of a writing in that name is in the person's own name and is not a forgery. Support for the position urged is not lacking in a number of decisions of State Courts. See 49 A. L. R. 2d 852, 868-869, 888-889. Under the so-called narrow rule defining forgery, hereinafter discussed, the strict and technical doctrine of construction of the indictment for which the ap-

pellant contends might be proper. But *we reject the narrow doctrine* and hold that, under the circumstances herein stated, *a forgery may be committed by the fraudulent use of an assumed or fictitious name.*"

The court reversed on both counts although it stated an offense was shown under count two. The distinction made by that court was that in connection with the hospital treatment Weinstein had not created any "character or personality associated with the name"; however, he had done so with the purchase of the jewelry since he had represented himself as the holder of several Masonic cards from Atlanta, thus creating "a fictional personality of Weinstein, the Mason who desired to purchase the Masonic ring. * * *"

First, it is submitted that such a fine distinction should not lie under the *broad* rule. However, if it does, Hanson used assumed names with the banks "to designate a fictitional person with characteristics, personality and assemblance of identity." *Otherwise, the banks would never have deposited the four checks to the accounts.*

Further, the appellant had used the same names previously for *dishonest purposes.* The court in *Hubsch* stated at page 823 that it was not, in effect, passing upon the question "if a person assumes a fictitious name as an alias, and it neither appears that the name assumed was a factor in procuring credit upon the instrument signed with the fictitious name *nor that the alias was previously assumed for a dishonest purpose,*" whether or not the signing of the alias or assumed name would be a forgery.

Thus, it is submitted that the convictions on the above forgery and uttering counts were valid.

(5) No Misconduct Occurred in the Arguments.

Appellant states that he was denied a fair argument because he was interrupted four times by Government counsel. However it is submitted that the minor interruptions shown in the transcript of record were warranted. Government counsel spoke up for the first time in an effort to assist Mr. Turner. He inadvertently said the agency in the case was the "Secret Service." Government counsel stated "not the Secret Service, if I may correct the record." This interruption was of no particular importance and Government counsel said nothing further when the Court admonished her for the interruption. [Rep. Tr. 531].

However, considerably later in appellant's argument Government counsel did interrupt him again when he endeavored, in effect, to testify. This was when he started to explain why the defendant didn't take the stand and testify. It was obviously because Turner had previously said in his opening statement it was his decision. [Rep. Tr. 68]. The Court at that point had told Mr. Turner that the Court would instruct on the law. It was improper for trial counsel for appellant to attempt to make the same contention on this touchy subject in his argument, since it amounted to giving testimony. In fact the Court advised him at the time "Well, counsel, you cannot testify as to your usual practices, and so on" [Rep. Tr. 542, 543]. Thus the interruption was entirely warranted.

The interruption which occurred at Page 550 was respect to counsel for appellant's statement as to what was happening as shown by the newspapers during the period

involved in the case. Mr. Turner stated that the jury could take judicial notice of the fact that there was a recession going on but the Court stated "Well now, if we are going to take judicial notice, we ought to have our geography correct. I think you are going a little beyond what the evidence shows. I don't mean to put you in a straight-jacket, but think of what you are saying, and bear in mind, please, the actual geography of the state, and you can argue the reverse, if you want to." Mr. Turner then went on to argue the recession. [Rep. Tr. 550].

In connection with the arguments with respect to the geography involved between Los Angeles and Taft, California, which related only to the transactions involving Peter Hall and Joseph J. Cook, Government counsel mentioned the distance from Los Angeles to Taft in her opening argument. (It is to be remembered that Mr. Hanna had testified that the distance from Taft to Bakersfield was approximately 40 miles. [Rep. Tr. 151].) In the opening argument Government counsel stated: "It doesn't take very long to get up to Taft; if you really want to get there you can travel up there in a couple of hours, ladies and gentlemen, or just a little over it." She then went on to discuss the fact that Mr. Evans had handled the transaction in question after 3:00 P.M. on that day and the defendant had "hours to get up and hours to carry forth this transaction." [Rep. Tr. 510, 511]. No objection was made to this argument by trial counsel. Rather, Mr. Turner also argued the time involved to considerable extent. He stated that Taft was 40 miles beyond Bakersfield and he had never been able to get to Bakers-

field in less than 3 hours. "Maybe some of you have but I never have. Taft is another 40 miles beyond that. I don't believe it is possible to make that in less than 4 hours driving like a maniac. But even if it is it is an awfully close thing . . ." [Rep. Tr. 549, 550]. In other words, he also assumed the jury was familiar with the geography. It was after that the Court stated: "Well now, if we are going to take judicial notice, we ought to have our geography correct. . . . Bear in mind, please, the actual geography of the state. And you can argue the reverse, if you want to." [Rep. Tr. 550].

In closing argument Counsel for the Government treated the matter to some limited extent by stating that Taft was not 40 miles north of Bakersfield but was well on the south side of Bakersfield. "I think we all know you can make it to Taft in 2½ hours if you want to make it in that kind of a hurry. . . . If a person has a real incentive to get to that city in a certain time, and establishes an alibi somewhere else before going." [Rep. Tr. 555, 556].

It appears first of all that trial counsel for appellant joined in with Government counsel in arguing the distance between Los Angeles and Bakersfield, obviously on the assumption that every one concerned, including the jury, was familiar with the geography of the state. Furthermore the Court, in view of the argument that was made, appeared to take judicial notice of the geography. It was more or less admitted by Appellant's trial counsel that Taft is only several hours away from Los Angeles and the question was whether the defendant could have made it in the time involved. The real question was not

particularly the distance, since Taft is only 40 miles away from Bakersfield, but whether or not appellant was sufficiently skilled in driving to have made it up to Taft in the time allotted. It is felt that appellant, particularly because he joined in the argument of the matter without objection, was not prejudiced in any respect by the argument made by Government counsel. Anyway, the credibility of defense witnesses was for the jury.

It is to be noted that present counsel for appellant only appears to stress the fact that Taft was *slightly* farther from Los Angeles than Bakersfield, but makes no complaint about the absence of any specific testimony of the distance from Los Angeles to Bakersfield. The small distance between Bakersfield and Taft could have made no substantial difference in the case.

Further, Government counsel did not discredit appellant's trial lawyer in any way in the argument. A reading of the entire opening and closing argument shows that all of the statements made with respect to Mr. Turner were made in the context that there was actually no defense, that his techniques and physical movements during argument were used because of the difficulty in discussing such lack of defense. [Rep. Tr. 557]. In fact Government counsel stated ". . . I don't mean to depreciate Mr. Turner as an attorney, I think he has done everything he could do with the lack of defense that he has. But, as a matter of fact, when you boil his argument down, he has actually said very, very little. I won't say he has said nothing, but he has said very little to you with respect to the evidence in the case." [Rep. Tr. 555].

Certainly Government counsel was entitled to comment on Mr. Turner's action in holding up the fine print of the court rules for attorneys before the jury for a short period of time and then arguing, in effect, that they could not possibly hope to remember what was contained in the document. "It was just a courtroom stratagem obviously designed to distract [the jury] from the evidence in the case."

The only reason that Government counsel made a remark about Mr. Turner talking to the jury out of her hearing, was that she was not sure what he had said. She then assumed what his statement had been and went on to argue the matter.

It is true that "prosecuting attorneys occupy very high and responsible positions" but it is also true that some latitude in expression is allowed to counsel for both parties in argument during the heat of the trial. There was nothing in the argument by Government counsel in this case that prejudiced appellant in any way or that was not stated in a spirit of fair play, giving counsel for defendant an adequate chance to respond.

(6) The Verdict Was Not Fatally Defective and Unintelligible.

It is obvious, from looking at the verdict, [Rep. Tr. 23], that the jury inadvertently struck out the word "guilty" in front of the statement "as charged in Count One of the Indictment." This apparently was due to some confusion as to the way in which the verdict started out. However it is obvious that the jury found the defendant guilty on Counts Two through Twenty-Two.

It is perfectly clear that in each one of the Counts, except for Count One, it is plainly stated that the appellant was found guilty. For instance, it reads: "Guilty as charged in Count Two of the Indictment, Guilty as charged in Count Three of the Indictment . . ." up to "Guilty as charged in Count Twenty-Two of the Indictment." There is no doubt that the jury intended to find the defendant guilty on each one of those counts. Furthermore, the court gave the defendant the benefit of the doubt on the verdict as returned on count One of the Indictment and dismissed that count since the word guilty had been scratched out. Thus he was not sentenced on that count and no prejudice whatsoever occurred.

The Judgment should be affirmed.

Respectfully submitted,

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No. 16,405

United States Court of Appeals

For the Ninth Circuit

TRAVIS BUFORD,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S OPENING BRIEF.

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Subject Index

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No. 16,405

United States Court of Appeals

For the Ninth Circuit

TRAVIS BUFORD,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S OPENING BRIEF.

A STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING JURISDICTION OF THE DISTRICT COURT AND OF THIS COURT HEREIN.

An indictment was presented by the Grand Jury of the Northern District of California against appellant and Teresa Turner.

Count I charges that Teresa Turner and appellant, on or about the 30th day of July, 1958, in the City and County of San Francisco, and Northern District of California, did unlawfully sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a narcotic drug, to-wit, approximately 7 grains of cocaine hydrochloride, in violation of Title 26, U.S.C., Sections 4704 and 7237.

The second count charges appellant alone, on or about the 4th day of August, 1958 in San Francisco,

Northern District of California, did unlawfully sell, dispense and distribute, not in and from the original stamped package, a certain quantity of a narcotic drug, to-wit, approximately 5 grains of cocaine hydrochloride, in violation of Title 26, U.S.C., Sections 4704 and 7237.

The third count charges Teresa Turner and appellant with having wilfully, knowingly, and unlawfully, conspired together and with other persons unknown to the Grand Jury, at a time unknown to the Grand Jury, in the State and Northern District of California, to commit an offense against the United States in violation of Section 4704 of Title 26, United States Code.

That the object of the said conspiracy was to unlawfully sell, dispense, and distribute, not in and from the original stamped package, a certain quantity of a narcotic drug, to-wit, cocaine hydrochloride.

That in pursuance to said conspiracy and to effect the object thereof, the defendants hereinafter named did the following overt acts:

1. On July 30, 1958 appellant did deliver a package of cocaine within the premises located at 1503 Ellis Street, San Francisco, California.

2. On July 30, 1958 Teresa Turner and appellant had a conversation within the premises located at 1503 Ellis Street, San Francisco, California.

3. On July 30, 1958 appellant received the sum of Forty ($40) Dollars upon the premises located at 1503 Ellis Street, San Francisco, California. (Tr. 3.)

To each of the three counts, appellant pleaded "Not Guilty" (Tr. 11, Judgment).*

Trial by jury was waived (Tr. 10) and the cause came on for trial before the Court, sitting without a jury, Hon. Michael J. Roche, judge, on January 26, 1959. (Tr. 15.)

Prior to the trial the defendants moved for an order directing the government to produce reports and documents for inspection (Tr. 6), and which motion the Court denied without prejudice to renewal at time of trial. (Tr. 9.)

Upon the trial, at the conclusion of the government's case, defendants made a motion for a judgment of acquittal, which motion the Court denied. (Tr. 10.)

Defendants, at the conclusion of the trial and after having been found guilty by the Court (Tr. 11) moved for a new trial, which motions were also denied by the Court. (Tr. 11.)

On February 9, 1959, after having been theretofore found guilty of violations of Title 26, U.S.C., Sections 4704 and 7237 (sell, dispense and distribute a narcotic drug); Title 18, Section 371 (conspiracy); the Court sentenced appellant to serve two years imprisonment, on each count, but the imprisonment on all counts to run concurrently with each other, and to pay a fine of Five Hundred and No/100 ($500.00)

*Teresa Turner was also convicted and sentenced on the first and third counts of the indictment, but she did not file any appeal, consequently this brief is on behalf of appellant alone.

Dollars on each count, total fine Fifteen Hundred and No/100 ($1500.00) Dollars. (Tr. 12.)

Notice of appeal was filed by appellant on February 17, 1959. (Tr. 13.)

JURISDICTIONAL STATEMENT.

A. THE STATUTORY PROVISIONS BELIEVED TO SUSTAIN THE JURISDICTION.

(1) The Jurisdiction of the District Court.

Amendment VI to the Constitution of the United States provides:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed."

Section 3231 of Title 18 of the United States Code provides:

> "The District Courts shall have original jurisdiction, exclusive of the Courts of the States, of all offenses against the Laws of the United States."

(2) The Jurisdiction of this Court Upon Appeal to Review the Judgment in Question.

Section 1294 of Title 28 United States Code provides:

> "Appeals from reviewable decisions of the District and Territorial Courts shall be taken to the Courts of Appeal as follows:
>
> (1) From a District Court of the United States to a Court of Appeals for the Circuit embracing the District."

(2) Section 1291 of Title 28, United States Code provides:

"the Courts of Appeal shall have jurisdiction of Appeals from all final decisions of the District Courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

B. THE PLEADINGS NECESSARY TO SHOW THE EXISTENCE OF THE JURISDICTIONS.

The indictment (Tr. 3-5) pleas of not guilty to each count entered by defendant. (See Recitation in Judgment, Tr. 11.)

C. THE FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE DISTRICT COURT HAS JURISDICTION AND THAT THIS COURT HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT IN QUESTION.

Reference is respectfully made to the commencement of this brief, where the facts with respect to the indictment, plea, judgment, and orders are set forth.

STATEMENT OF THE CASE.

Herein is summarized briefly, but as accurately as possible, the evidence adduced at the trial, upon which the conviction is based.

On July 30, 1958, an informer, Malvina Webb (the transcript incorrectly named her as Malvino) was equipped with a Schmidt transmitter (described as a radio transmitter) concealed in her purse and taken to a barber shop at 1503 Ellis Street. Prior to this the transmitter had been tested to determine if it was being received on the agent's receiver in a government automobile parked nearby. Prior to going to the barber shop Malvina Webb was searched at the Central Emergency Hospital in San Francisco by a doctor and a nurse. At 3:00 p.m. a government automobile was parked on Ellis Street, between Webster and Hollis, about a half-block away from the barber shop at 1503 Ellis Street, and the informer entered the barber shop, while the agent testifying (Theodore J. Yannello) remained in the vehicle. The agent had heard the informer's voice over the transmitter while testing the device. He heard the informer's voice coming over the transmitter while she was in the barber shop, which said: "Hi, Travis, Honey." There was a pause, then the informer said: "I have $40.00 and I'd like to have some of the action we talked about." (Tr. 32.) Another voice said: "All right, be by at 6:30 and it will be all set." The informer had been given $40.00 by the agent. The informer remained in the barber shop about five minutes, and when she came back to the agent, she was taken to the hospital to be searched, and there was no money. About 6:30 or 6:40 that evening the informer was again taken to the hospital to be searched, and then was again taken to the vicinity of the barber

shop; she was again equipped with the transmitter, and she entered the barber shop. The officer remained outside till she entered, and he then went in the automobile. Another officer, state agent William G. Walker, and other officers were in the immediate vicinity. At about 7:00 o'clock that evening Walker saw Malvina Webb enter the barber shop while he was fifty or seventy-five yards behind her. He walked by and saw the informer in the barber shop. He also saw the defendants in the shop. The informer was standing at the foot of the first chair while appellant was working on someone. The officer heard appellant say: "I'll be with you in just a minute, just as soon as I finish this process job." He saw the defendant, Teresa Turner in the barber shop, further back. About ten or fifteen minutes after her entry, he saw the informer leave. There were probably five or six other persons in the barber shop as he passed by, and the shop was wide open. (Tr. 44.) This was the first time he had ever heard appellant's voice, and had never heard her voice over a Schmidt transmitter, and does not know if any other persons in the shop used their voice. Yannello, who had been withdrawn as a witness to permit Walker to testify resumed the stand and testified: At 7:00 p.m. he heard the informer say "Hi", or something like that; then heard a voice say, "I'll be with you in a moment, as soon as I get through with this process job." "I've got you two $20.00 papers." (Tr. 57.)) The witness later changed this testimony to be he heard a voice say, "I got you two $20.00 papers and I want to taste

some of it." The informer said, "All right." He then heard a knock and the informer said: "Teresa, get your black fanny away from here—you always want some for free." A voice answered: "If you don't let me in and give me some, I'm going to tell your old man what you're doing." The informer said: "All right, come on in"—then said, "Teresa, don't take it all. If you do, I'll end up with the papers and no coc." Then the informer said: "I'll be by tomorrow and make a little bigger buy, is that all right?" And that voice answered, "Fine." She said "if my store hasn't run out of stuff you can pick it up. And today." She says "when the connection came by I wasn't in the barber shop; so, he gave the stuff to Teresa, and she gave it to me when I came back." Then the informer left the barber shop; came to the car, entered the car and handed the officer the package marked "Exhibit No. 1". (Tr. 59-60.)

On August 4, 1958 Malvina Webb was again searched at the hospital and furnished with $100.00 in government funds. The transmitter was again tested, and the informer went into the barber shop at 7:00 p.m. She remained about a half hour. She left the area and again returned and entered the barber shop, remaining a half hour, and emerged about 9:00 p.m. and went her own way.

About 8:10 or 8:15 p.m. on August 4th, Agent Walker saw appellant leave the barber shop, and return about a half hour later. He saw the informer enter the shop the third time about 8:30 and leave about 9:00 p.m.

Agent Hipkins testified that on August 4th, while in the government automobile, at about 7:00 p.m. he heard the informer's voice over the transmitting device, say: "Travis, I want to get two spoons of coc." A female voice replied: "I will have to call my connection and place the order." At about 8:50 p.m. he heard the same voice that he had heard earlier that evening say: "Here's the stuff." He later changed this conversation (Tr. 75) to be "Here's the stuff, but be careful. It is more powerful than the last stuff and I want to take a snort before you go." Shortly thereafter he saw the informer walking south on Webster Street. He followed her to a point on Golden Gate between Webster and Buchanan, at which point he picked her up in a car and she handed him the two pink paper bindles. (Exhibit No. 2.) Neither exhibits 1 or 2 contained revenue stamps and the chemist testified they both contained cocaine.

Agent Yannello arrested both defendants on August 7, 1958, on which date he talked with them in the Federal Office Building. He told the defendant (?) that they were under arrest for violation of the Federal Narcotic Laws (Tr. 64) and said: "Just to show that we know what we are talking about, I'm going to tell you what happened on July the 30th. We had an informer go in your shop, in the beauty salon at 1503 Ellis." "At 3 o'clock she went in and made an order and you told her to come back at 6:30 that night." "She came back in at 7:00 and you took her to a little back room and you gave her two $20.00 papers; that you wanted to taste the narcotics your-

self." "You did." "While you were tasting it, your sister, Teresa, wanted some of it and was told to go away by the special employee." "She said that if they didn't let her in and give her some, she was going to tell the special employee's old man what she was doing." "She came in and took a taste and you told the special employee that she could come back by tomorrow and make another purchase." "That particular July 30th when the connection was to come by with the narcotics you weren't in the barber shop, so he gave it to your sister, Teresa, and she in turn gave it to you when you came back." Buford said: "That is exactly what happened." "How do you know that?"

The agent said: "When we sent our special employee in she had on a transmitter so we could hear everything that happened in that barber shop."

The officers told them that they wished their services in apprehending their source of supply, and defendant Turner said: "By golly, she said she was going to work for you and give you the source of supply and anybody else that she knows that is dealing in narcotics," and she said, "You call me and I will make sure she goes to work for you."

On the occasion of the arrest of defendants on August 7th, they were not booked. (Tr. 84.) They were actually booked on August 26th, twenty-two days after the conversation referred to as having been heard over the transmitter on August 4th. (Tr. 84.)

ARGUMENT.

I. THERE HAS BEEN NO ILLEGAL CONSPIRACY PROVED.

If in fact any conspiracy has been shown—and appellant does not concede this, although she assumes it only for the purposes of this argument, it had to include the informer, or there was no conspiracy at all. Since this was a feigned agreement made and contrived by the government, the informer being an agent of the government, her participation cannot be charged to appellant. Without her participation there was no occasion for an agreement to perform certain acts. The whole purpose of the arrangement entered into by Malvina Webb was to entrap appellant into selling or furnishing narcotics, and thus giving cause to arrest appellant.

It has been held that an agreement by two persons to commit a particular crime cannot be prosecuted as a conspiracy when the crime is of such a nature as to necessarily require the participation of two persons for its commission.

United States v. Katz, 271 U.S. 354, 70 L.Ed. 986, 46 S.Ct. 513 Aff'g (D.C.) 5 Fed (2d) 527;

Gebardi v. United States, 287 U.S. 112, 77 L.Ed. 206, 53 S.Ct. 35, 84 A.L.R. 370;

United States v. Zevli, (C.A. 2d) 137 Fed. (2d) 845;

People v. Keyes, (Cal.) 284 Pac. 1105;

People v. Wettengol, 98 Colo. 193, 58 Pac. (2d) 279, 104 A.L.R. 1423;

United States v. Dietrich, (C.C.) 126 Fed. 664, 666;

Bracco v. U. S., (C.C.A. 6) 117 Fed. (2d) 858.

Since the indictment charges a conspiracy to sell, distribute and dispense narcotics (Tr. 4) the foregoing principle of law is applicable, as no sale could be executed without both a purchaser or receiver, and seller or dispenser.

It is the law that the acts, statements or declarations of a decoy or feigned accomplice, may not be charged to the principal or co-conspirator.

Williams v. State, 55 Ga. 391;

Price v. People, 109 Ill. 109;

People v. Goldberg, 152 Cal. App. (2d) 562, 314 Pac. (2d) 151 at 158.

II. THE EVIDENCE OF THE TWO SUBSTANTIVE COUNTS IS INSUFFICIENT.

The government informer and operative was not in Court, and did not testify. Instead, the government agents gave testimony of her activities and conversations which they were able to see and hear. None of her acts or conversation were chargeable to appellant.

Williams v. State (supra), 55 Ga. 391;

Price v. People (supra), 109 Ill. 109;

People v. Goldberg (supra), 152 Cal. App. (2d) 562, 314 Pac. (2d) 151 at 158.

The only purpose this testimony by the government agents had, was to give meaning to the acts and

remarks of appellant, if indeed any such acts and remarks were proved. Appellant earnestly contends there was no such proof. The first remark attributed to appellant in the evidence was: "All right, be by at 6:30 and it will be all set." (Tr. 32.) Agent Yannello did not identify the voice that made that statement. (Tr. 32.) Nor did any other witness. At 7:00 p.m. that night this same witness claims to have heard over the Schmidt transmitter, the same voice say: "I'll be with you in a moment, as soon as I get through with this process job." He still was unable to identify this voice. However, another witness, state agent William G. Walker, claims that at the same time, as he was passing by the barber shop, he heard the appellant use nearly these same words. (Tr. 43.) On cross-examination he said there were 5 or 6 persons in the shop at that time. He was looking through the window when he saw appellant's lips move, but even though the door to the shop was open, he turned his head towards the street as he passed the open door. (Tr. 44.) Also he does not know whether any of the other persons in the shop used their voice. (Tr. 45.) Agent Yannello, resuming the stand, attributed to the same voice some conversation concerning two $20.00 papers. Then he heard a knock, intimating the persons were in the back of the shop then, and some further conversation with one Teresa (Tr. 59) and then some remarks about what one of the participants in the conversation could do the following day. (Tr. 60.) Agent Yannello testified that on August 7th, when he had first arrested appellant, at his office,

she told him that it was her voice he had first heard at 3:00 p.m. on July 30th say: "All right, be by at 6:30 and it will be all set."

He now claims that from these short words he was able to say the voice was the same on the subsequent conversations to which he testified. Of course, appellant claims that since he was unable to identify the utterer on this occasion, he still cannot identify the utterer on the subsequent occasions.

It is important to remember that appellant was never shown to possess or handle narcotics, or to possess or handle any of the government money.

To emphasize, the only identification of appellant with the alleged crimes is Agent Yannello's statement that appellant admitted "That is exactly what happened" when he told her about the events on July 30th (Tr. 64-65); and Agent Walker's testimony that he heard appellant say: "I'll be with you in a moment, as soon as I get through with this process job."

None of these conversations were recorded, although they could have been. (Tr. 83-84.)

There is a stipulation that the informer was searched, but no stipulation or evidence that the search revealed she had no narcotics. (See Tr. 87.)

Under the circumstances, the proof that she obtained the narcotics from appellant, as alleged in the indictment, is still more nebulous.

Appellant believes the law as it applies to telephone conversations is the same as it applies to conversations

over the Schmidt transmitter. The contents of a telephone conversation are admissible only if the identity of the person with whom the witness was speaking was satisfactorily established. If there is no identification, proof of the conversation must be excluded.

Lewis v. United States, (C.A. 1st) 295 Fed. 441 cert. den., 265 U.S. 594, 68 L.Ed. 1197, 44 S.Ct. 636;

Lewis v. United States, (C.A. 6th) 11 Fed. (2d) 745;

Van Riper v. United States, (C.A. 2d) 13 Fed. (2d) 961, cert. den., 273 U.S. 702, 71 L.Ed. 848, 47 S.Ct. 102;

Merritt v. United States, (C.A. 9th) 264 Fed. 870, rev'd on confession of error, 255 U.S. 579, 65 L.Ed. 795, 41 S.Ct. 375.

The law that a crime may not be proved by the words that come out of the mouth of the defendant in an extrajudicial admission, is so well known, that appellant believes it would be presumptuous and far from flattering to this Honorable Court to cite cases for this well known principle of law.

19 *Cal. Jur.* (2d) 182, 183.

III. ERRORS OF LAW IN THE ADMISSIBILITY OF EVIDENCE.

Objection was first made by appellant when officer Yannello testified to the conversation alleged to have been heard by him over the Schmidt transmitter, on the ground of hearsay because he could not identify

appellant's voice. (Tr. 31.) Further objections on the same ground were made at Tr. 34, 56, 57, 72, 73, 74. All of these objections were overruled.

Appellant objected to the receipt in evidence of the narcotics alleged to have been sold by appellant to the government decoy on the ground they have not been identified with her. (Tr. 86.) The objection was overruled at Tr. 94.

IV. THE MOTIONS FOR ACQUITTAL AND FOR NEW TRIAL WERE ERRONEOUSLY DENIED.

These motions were made as indicated at Tr. 86, 94, at the conclusion of the government's case. The motion was renewed after appellant was convicted. (Tr. 102.) Motion for a new trial was made also after conviction. All motions were made on substantially the same grounds, to-wit: That the narcotics were not identified with appellant, and the Court erroneously received evidence of the conversations over the Schmidt transmitter, without sufficient identification of appellant's voice. All motions were denied. (Tr. 97, 98, 102.)

CONCLUSION.

In conclusion, appellant urges that the evidence against her in counts I and II, while under the law there could be no criminal conspiracy at all, was so nebulous that the trial judge inquired of the United States attorney (Tr. 95), "Has this been proven?"

While it would be hazardous to speculate on the judge's reasons for his change of mind later, when he denied the motion for acquittal (Tr. 97), there appears to appellant to be no alternative for this Court, but to reverse the judgment, particularly the order denying the motion for acquittal. The well known and revered doctrine of the presumption of innocence should unerringly lead to this result.

Dated, San Francisco, California,
May 25, 1959.

Respectfully submitted,
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ARTHUR D. KLANG,
By ARTHUR D. KLANG,
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(Appendix A Follows.)

Appendix "A"

Appendix A

INDEX OF EXHIBITS IN RECORD

Plaintiff's No.	Exhibits	Description	Page Identified	Page Offered	Page Received
1	2	Bindles cocaine	19	86	94
2	2	Pink bindles cocaine	20	86	94

No. 16,405

United States Court of Appeals

For the Ninth Circuit

TRAVIS BUFORD,	*Appellant,*
vs.	
UNITED STATES OF AMERICA,	*Appellee.*

BRIEF FOR APPELLEE.

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No. 16,405

United States Court of Appeals

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TRAVIS BUFORD,

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BRIEF FOR APPELLEE.

JURISDICTION.

A three-count indictment was returned on August 28, 1958, by the Grand Jury of the Northern District of California against appellant and one Teresa Turner.

Count No. I charged appellant and Teresa Turner with the sale of narcotics in violation of Title 26 U.S.C. Secs. 4704 and 7237 on July 30, 1958.

Count No. II charged the appellant, alone, with another sale of narcotics in violation of the same sections on August 4, 1958.

Count No. III charged appellant and Teresa Turner with conspiracy to violate the narcotic laws of the United States, in particular Title 26 U.S.C. Sec. 4704, (T.R. p. 3).

To each of the counts the appellant pleaded "Not Guilty," and waived trial by jury. On February 26, 1959, the case came on for trial before the Court sitting without a jury, Honorable Michael J. Roche presiding. At the conclusion of the Government's case, appellant made a motion for judgment of acquittal which motion the Court denied. At the conclusion of the trial the Court found appellants guilty on all three counts. Teresa Turner was convicted and sentenced on the 1st and 3rd counts of the indictment, but has taken no appeal. Notice of Appeal was filed by the appellant on February 17, 1959.

Jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1291.

STATEMENT OF FACTS.

On July 30, 1958, between 2:30 P.M., and 2:45 P.M., agents of the Federal Bureau of Narcotics had a woman informer searched at the Central Emergency Hospital in San Francisco by a nurse and doctor. The informer was equipped with a Schmidt device, a radio transmitter, which was carried in her purse. The radio transmitter and receiver were tested before use. The agents then gave $40.00 to the informer and took her to the vicinity of 1503 Ellis Street in San Francisco, a barbershop at which appellant was employed, which address she was observed to enter at approximately 3:00 P.M., (T.R. pp. 25-29).

Federal Agent Yannello heard over the radio receiver the informer say upon entering the shop: "Hi,

Travis, honey, . . . I have $40.00 and I'd like to have some of the action we talked about." The agent heard a voice respond, "All right, be by at 6:30 and it will be all set," (T.R. p. 32). The informer remained in the barbershop about five minutes and then returned to the agent's automobile parked about half a block away. The informer was then taken back to the hospital and searched by the nurse and doctor, and her clothing was searched by the agents. The $40.00 mentioned above was missing (T.R. p. 32).

The informer was similarly searched about 6:30 P.M., the same evening, equipped with a radio transmitter, and under the surveillance of the agents, she entered the barbershop at approximately 7:00 P.M., (T.R. pp. 33-36). Immediately upon the informant's entering the barbershop, the voice mentioned previously was overheard to state, "I will be with you in a minute, just as soon as I finish this process job." (T.R. 38 and T.R. 57). The agents then overheard by means of the radio the voice state to the informer, "I got you two $20 papers and I want to taste some of it." The informer stated, "all right." At that time there was a knock heard on the radio device and the informer said: "Teresa, get your black fanny away from here—you always want some for free." The informer was heard to say, "I'll be by tomorrow and make a little bigger buy, is that all right?" The voice replied, "Fine, if my store hasn't run out of stuff you can pick it up. And today, when the connection came by I wasn't in the barber shop; so, he gave the stuff to Teresa and she gave it to me when I came back."

(T.R. pp. 59-60). The informer left the barbershop and walked about a block and a half and gave the narcotics to the agent (T.R. 60). (Exhibit I)

On August 4, 1958, about 6:00 P.M., the informer was similarly searched (T.R. 61). She was subsequently furnished $100.00 of Government funds and with a radio transmitter, and was accompanied by the agents to the barbershop at approximately 7:00 P.M., and entered therein. The informer was heard over the radio device to say, "Travis, I want to get two spoons of Coc." The voice mentioned previously replied, "I will have to call my connection and place the order." (T.R. 73).

Appellant was observed leaving the barbershop at approximately 8:00 P.M., and returned to the barbershop at approximately 8:45 P.M., (T.R. pp. 40-41). At approximately 8:50 P.M., the agents heard the previously mentioned voice state over the radio device, "Here's the stuff, but be careful—it is more powerful than the last stuff, and I want to take a snort before you go." (T.R. p. 75). Five minutes after this last conversation overheard over the radio device, the informer joined the agents and handed him the narcotics of Exhibit No. II, (T.R. pp. 75-76). These facts were admitted by appellant after arrest. (T.R. p. 65).

On August 7, 1958, Agent Yannello arrested the appellant along with co-defendant Teresa Turner, who was convicted but is not appealing. At that time the agent repeated all of the previous conversations, identifying appellant as the aforementioned voice. Appel-

lant then admitted that the above recital of facts was in substance correct saying, "That is exactly what happened."

QUESTIONS PRESENTED.

1. Was an illegal conspiracy proved?

2. Was the evidence on the two substantive counts sufficient to sustain the verdict of guilty?

3. Was hearsay evidence wrongfully admitted?

ARGUMENT.

I. AN ILLEGAL CONSPIRACY WAS PROVED.

Defendant's argument that no illegal conspiracy has been entered into borders upon the frivolous. First of all, the jury found that a conspiracy was entered into between Teresa Turner and the appellant, not between the appellant and Malvina Webb. In the latter case, the cases cited by the appellant on Pages Nos. 11 and 12 of its brief would be apposite since it is agreed that where the nature of the crime requires two participants, these two participants may not be charged as the sole conspirators. If the nature of the crime requires two participants, however, and more than two people agree to participate, a conspiracy can be entered. Here the conspiracy was not between the two parties necessary to the transaction, but rather between the appellant and Teresa Turner. See *Lett v. United States,* 15 F.2d, 690.

II. THE EVIDENCE ON THE TWO SUBSTANTIVE COUNTS WAS SUFFICIENT TO CONVICT.

There was sufficient evidence for the judge to find the appellant guilty on the two substantive counts. Appellant bases his entire argument on this point on the fact that the voice of appellant could not be recognized over the Schmidt device. Were it solely a question of the recognition of the voice of the appellant, the Government would have no choice but to confess error. Here, however, there are other items which are sufficient to support the judge's verdict. First, and most important is the fact that the appellant admitted the violations and admitted that the voice was her's. It is difficult to find stronger evidence than this. Furthermore, the nature of the conversation with the informer and, most specifically, the fact that some of the words appeared to have been in answer to the name of the appellant. For instance, the appellant said, "Hi, Travis, honey; I have $40.00 and I would like to have some of the action we talked about." In reply to this the voice said, "All right, be by at 6:30 and it will be all set." From this the judge could conclude—and obviously did, that the voice belonged to Travis Buford, the appellant. Secondly, on August 4, the informer was heard to say, "Travis, I want to get two spoons of Coc." In reply to this, the voice said: "I will have to call my connection and place the order." Certainly, the judge could conclude that this reply, too, was spoken by the person to whom the request was made. Lastly, the Government produced an agent who testified that he heard the appellant make a remark which was the same remark made by the unidentified voice heard over the Schmidt device.

Certainly, the judge could conclude that since the Schmidt device picked up this remark only once, only one person made it and that person was the appellant. From this evidence the judge could infer, since the testimony was that the same voice made all of the remarks attributable to the unidentified voice, that the appellant had, as she admitted, made all the remarks attributable to her.

It should be remembered in reviewing this case that this Court is not passing on the question of whether the Government has proved to its satisfaction beyond a reasonable doubt the guilt of the appellant upon the two substantive counts. The judge who heard the witnesses has determined that, and it is for this Court merely to decide whether there was sufficient evidence so that a reasonable judge could conclude as this judge did. The Government submits that the evidence here is ample to sustain that burden.

It is a well established principle that this Court will indulge in all reasonable presumptions in support of the ruling of the trial court, and, therefore, will resolve all reasonable intendments in support of a verdict in a criminal case. In determining whether the evidence is sufficient to sustain a conviction, it will consider that evidence in the light most favorable to the prosecution.

Henderson v. United States, 143 F. 2d 681 (C.A.9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A.9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th);

Bell v. United States, 185 F. 2d 302, 308 (C.A. 4th);

Gendelman v. United States, 191 F. 2d 993 (C.A.9th);

Barcott v. United States, 169 F. 2d 929, 931 (C.A.9th) cert. denied 336 U.S. 912.

The proof in a criminal case need not exclude all possible doubt, but need go no further than reach that degree of probability where the general experience of men suggests that it is past the mark of reasonable doubt.

Henderson v. United States, 143 F. 2d 681 (C. A.9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A.9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

Norwitt v. United States, 195 F. 2d 127 (C.A. 9th).

The measure of reasonable doubt is generally said not to apply to specific detailed facts but only to the whole issue. Wigmore on Evidence (3d ed. 1940), Vol. IX, Sec. 2497, p. 324.

An appellant court is not concerned with the weight of the evidence. All questions of credibility are matters for determination by the trial court.

Gage v. United States, 167 F. 2d 122, 124 (C.A. 9th);

Pasadena Research Laboratories v. United States, 169 F. 2d 375 (C.A.9th) certiorari denied, 335 U.S. 853, 69 S.Ct. 83;

United States v. Socony-Vacuum Oil Company, 310 U.S. 150, 254;

Gendelman v. United States, 191 F. 2d 993 (C. A.9th);

C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (C.A.9th).

III. THE EVIDENCE OF APPELLANT'S STATEMENTS WAS PROPERLY ADMITTED.

Appellant's third point, that of the hearsay, is basically the same as its previous points. Admittedly, all extrajudicial statements made by the defendant out of Court are hearsay. They are admitted, however, under the admissions exception to the hearsay rule. The question here is whether the judge could find that the statements were in fact made by the defendant. The Government submits again that the evidence was sufficient for the judge so to find and that, therefore, there is no hearsay problem.

For the foregoing reasons the judgment should be affirmed.

Dated, San Francisco, California,
July 7, 1959.

LYNN J. GILLARD,
United States Attorney,
JOHN H. RIORDAN, JR.,
Assistant United States Attorney,
JOHN KAPLAN,
Assistant United States Attorney,
Attorneys for Appellee.

No. 16,405

United States Court of Appeals

For the Ninth Circuit

TRAVIS BUFORD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

MORRIS OPPENHEIM,
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No. 16,405

United States Court of Appeals

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TRAVIS BUFORD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

THE FACTS.

In responding to the brief for appellee, appellant is first desirous of commenting on the statement of facts contained in its brief.

Appellee does not point out or even mention that no officer was familiar with the voice that was heard over the transmitter, nor that five or six other persons were in the shop when appellant was assumed to have spoken the words described by Agent Yannello, nor that Agent Walker did not know whether any of the five or six persons in the shop used their voice. He did not hear the informer say anything preceding the words attributed to appellant: "I'll be with you in just a minute, just as soon as I finish this process job."[1] (TR 37, 44-45.)

[1]As a result, no one can say with reasonable clarity that the foregoing remark was in answer to the informer or that the words were directed to her.

Neither has the court's attention been called to the fact that Agent Walker referred to appellant Buford as Turner. (The other defendant.) (TR 37, 38.)[2]

ARGUMENT.

THE CONSPIRACY.

Appellee charges that appellant's argument that no illegal conspiracy has been entered borders upon the frivolous. (Appellee's Brief, 5.)

The conspiracy charged in the indictment (TR 4) is that Teresa Turner and Travis Buford with other unknown persons at an unknown time agreed to unlawfully sell, dispense, and distribute not in and from the original stamped package a certain quantity of a narcotic drug, to-wit: cocaine hydrochloride. The fact that the informer was not named in the indictment does not negate the proof, which very clearly points to her as the conspirator, and not Teresa Turner. The government's own witness introduced the evidence at TR 8: "A voice answered: 'If you don't let me in and give me some, I'm going to tell your old man what you're doing.' " These very words indicate that the speaker was not a part of any conspiracy. Should the government now take the position that there is no proof these words were uttered by Teresa Turner, then their entire case falls on that point alone. On the other hand, if the government insists that Teresa Turner was the utterer, these words indicate she may

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[2]The importance of the above factors is that, under the circumstances, the trial Court's rulings overruling appellant's objections to the alleged conversation as hearsay were incorrect at the time, and this prejudiced her entire defense.

have suspected what the informer and Travis Buford were doing, but she was prepared to inform on them unless she was given some. This, certainly, does not indicate a conspiracy between Travis and Teresa. Rather, does it point to a conspiracy between Travis and the informer. Since such a conspiracy cannot be prosecuted as unlawful because one of the conspirators was a government agent, appellant's insistence that no unlawful conspiracy was proved is not frivolous.

Williams v. State, 55 Ga. 391;

Price v. People, 109 Ill. 109;

People v. Goldberg, 152 Cal. App. (2d) 562, 314 Pac. (2d) 151 at 158.

THE SUBSTANTIVE COUNTS WERE PROVED SOLELY BY EXTRAJUDICIAL WORDS OUT OF THE MOUTH OF APPELLANT.

Appellee concedes it would have to confess error if it were solely a matter of a recognition of the voice of appellant. (Appellee's Brief, 6.)

In the absence of any other proof of the corpus there could not be a conviction. True, the law in federal jurisdictions states the rule differently, but the meaning is still the same. It seems to be the federal rule that a case cannot be proved solely by the extrajudicial statements of the defendant, and makes no reference to the "independent proof of the corpus delicti".

Vinkemulder v. United States (C.C.A. 5th), 64 Fed. (2d) 535, (cert. den.), 290 U.S. 666, 78 L. Ed. 576, 54 S. Ct. 87;

Flower v. United States (C.C.A. 5th), 116 Fed. 241;

Wiggins v. United States (C.C.A. 9th), 64 Fed. (2d) 950 (cert. den.), 290 U.S. 657, 78 L. Ed. 569, 54 S. Ct. 72.

Under this heading in its brief appellee claims that appellant admitted the violations. This is not the fact—the fact being only that she admitted the conversations as heard on the transmitter. This, appellant submits, is considerably different from admitting the violations. There can be no question that it is the law that a person is presumed to be innocent and not presumed to be guilty. If the fact of such conversations can be given an innocent interpretation, even though it can also be given a guilty interpretation, the trier of the facts is bound to accept the innocent interpretation.

United States v. Gasmiser Corporation (1948), 7 F.R.D. 712 at 714;

United States v. Lattman, (3 Cir. 1945), 152 Fed. (2d) 393, 394;

United States v. Thatcher (3 Cir.), 131 Fed. (2d) 1002, 1003;

United States v. Russo (3 Cir. 1941), 123 Fed. (2d) 420, 423;

Paul v. United States (3 Cir.), 79 Fed. (2d) 561, 563;

Wright v. U. S. (8 Cir. 1915), 227 Fed. 855, 857

and a great many others.

Appellant points out that this statement admitting the conversations over the transmitter is only a circumstance—it is not direct proof. The appellant could have had these conversations with Malvina Webb and meant something entirely innocent—she might have intended to mislead the informer, a customer of her barber shop, merely in order to appear to acquiesce rather than to engage in a controversy. Suffice to say, her words over the transmitter could have meant a multitude of things other than an agreement to actually dispense narcotics.

CONCLUSION.

Since the government for some reason did not produce the only witness who could have proved or disproved the crime alleged, it is respectfully urged that an admission by appellant that she engaged in certain conversations is indeed a slim chain of evidence required to be sufficient to convict beyond a reasonable doubt, particularly where the Court erroneously admitted evidence which otherwise might not have contributed to the case, deficient as it is.

Dated, San Francisco, California,
July 29, 1959.

MORRIS OPPENHEIM,
ARTHUR D. KLANG,
By ARTHUR D. KLANG,
Attorneys for Appellant.

No. 16,405

United States Court of Appeals
For the Ninth Circuit

TRAVIS BUFORD,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

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For the Ninth Circuit

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VS.	
UNITED STATES OF AMERICA,	*Appellee.*

On Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Richard H. Chambers, Chief Judge and the Honorable William Healy and Honorable Oliver D. Hamlin, Jr., Associate Judges of the United States Court of Appeals for the Ninth Circuit.

Comes now Travis Buford, appellant above named, and respectfully prays this Court to grant a rehearing of the above entitled cause, and in support thereof respectfully shows:

I. That the decision of this Honorable Court is based on an assumption of facts, which is not justified by the record.

II. That the proven facts upon which the opinion of this Court is specifically based are insufficient to support the judgment of conviction and are insufficient to overcome the presumption of innocence with which appellant is clothed.

I.

DISCUSSION.

THE DECISION OF THIS HONORABLE COURT IS BASED ON AN ASSUMPTION OF FACTS, WHICH IS NOT JUSTIFIED BY THE RECORD.

At the beginning of its opinion this Honorable Court, in concisely stating the facts upon which it is based, said:

> ". . . evidence was introduced to show that appellant was in the shop during both visits and that the informer left the shop both times *in possession of narcotics which she didn't have when she went in.*" (The emphasis is furnished because the emphasized portion—if that evidence is lacking—completely nullifies the government's case.)

The first valid reference to a search of the informer is at page 28 of the record, wherein defense counsel stipulated that she was searched—nowhere is there any evidence indicating the result of the search.

The next reference is at page 33 of the record where the officer merely testified that the informer was taken back to the hospital to be searched. Again no evidence is offered to the effect she did not possess narcotics.

Again at page 61 of the record, with reference to August 4th, there still is no evidence that the informer on being searched *did not have* narcotics.

Although this incident is immaterial, (page 85 of the record) the informer was brought to the Emergency Hospital on August 4th *after* she had delivered Exhibit No. 2 to the officer. Again, there is no evidence as to the result of the search.

In discussing this subject, it is important to note that there is no evidence negativing the possibility or likelihood that the informer was approached by or was in the company of any person other than appellant and thus eliminating the possibility or likelihood that the informer obtained the narcotics from some other person. To the contrary, (page 41) she was affirmatively shown to be in contact with a male negro after the search—and before the alleged receipt of the narcotics.

Page 49 indicates no one knows with whom she was in contact. At page 51 she was out of view of the officer. At page 52 it affirmatively appears she could have been in contact with any number of persons. At page 62 she was out of view of the officer.

It was held in:

> *People v. Morgan,* 157 Cal. App. (2d) 756, 321 Pac. (2d) 873,

that there was a fatal gap in the chain of evidence between the time the participant-informer left the presence of the officer and returned with the evidence.

This *Morgan* case followed the law laid down in:

People v. Richardson, 152 Cal. App. (2d) 310, 313 Pac. (2d) 651;

People v. Barnett, 118 Cal. App. (2d) at 338, 257 Pac. (2d) 1041.

This principle was later followed in:

People v. Lawrence, 168 C.A. (2d) 510, 336 Pac. (2d) at 192.

Since there is no affirmative evidence that the informer in this case did not already possess narcotics before coming in contact with appellant and also the fact that the evidence did not eliminate the possibility that the narcotics may have been procured from some person other than appellant—it is obvious that an indispensable link in the chain of evidence is missing here.

This Honorable Court again repeated the incorrect assumption that the informer *twice entered appellant's barber shop without narcotics and twice left the shop with them; and appellant was placed in the shop on both occasions.* (Page 2 of the opinion.)

There just simply is no evidence that the informer did not have narcotics when she entered the shop—and the evidence is very clear that other people were in the shop, and could have been the informer's supplier.

Since the conviction on the charges, including the conspiracy, is based on such a false premise, and since this Honorable Court clearly followed in the trial Court's misapprehension of the proven facts—the af-

firmance by this Court must, in fairness to appellant, be reconsidered.

PRAYER.

Wherefore, appellant prays that this Honorable Court make its order staying its mandate and grant a rehearing, or if the Court refuses to grant such rehearing that it stay the mandate pending the filing by petitioner and appellant of a petition for certiorari in the Supreme Court of the United States and pending disposition by that Court.

Dated, San Francisco, California,
December 1, 1959.

Respectfully submitted,
MORRIS OPPENHEIM,
ARTHUR D. KLANG,
By ARTHUR D. KLANG,
Attorneys for Appellant and Petitioner.

Certificate.

I, Arthur D. Klang, attorney for appellant, hereby certify that this petition is presented in good faith; that it is not interposed for delay, and that in my judgment it is well founded.

Dated, San Francisco, California,
December 1, 1959.

Arthur D. Klang.

No. 16409

IN THE

United States
Court of Appeals
For the Ninth Circuit

MYRON E. McPHERSON,
Appellant,

vs.

AMALGAMATED SUGAR COMPANY,
a corporation,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court
for the District of Idaho,
Southern Division

HONORABLE FRED M. TAYLOR, Judge

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Clerk

Filed

No. 16409

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No. 16409

IN THE

United States
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For the Ninth Circuit

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a corporation,

Appellee.

BRIEF OF APPELLANT

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING BASIS FOR JURISDICTION

This is an action to recover damages for personal injuries. Appellant's Complaint (T.R. 3-4) alleges jurisdiction in the District Court under United States Code, Title 28, Section 1332, as amended based upon diversity of citizenship by appellee corporation being a citizen of Utah, and appellant being a citizen of Idaho, and the amount in controversy, exclusive of interest and costs exceeds $10,000.00. (T.R. -4).

The District Court had jurisdiction under 28 U.S.C. Sec.1332 (a) (1). This Court has jurisdiction of the appeal under 28 U.S.C. Sec. 1291.

II

STATEMENT OF CASE

This action was brought by Myron E. McPherson, appellant, a former way maintenance employee of Union Pacific Railroad Company, at Gooding, Idaho, against Amalgamated Sugar Company to recover damages for loss of his right arm. He was injured on November 13, 1956, at the railroad yard in Gooding, Idaho, when he was struck down from the back by a gondola freight car which was fully loaded with sugar beets heaped high above the top of the car and set in motion by a pinch bar on an inclined track by an employee of appellee sugar company who operated the car on the inclined track for spotting in the railroad yard where appellant was working as a section crewman. Which operation and driving of the car was without a locomotive, the movement being by gravity of the loaded car. The operator mounted the brake platform on the easterly end of the car, which was moving westerly, with his vision of the track ahead of him completely obscured by the load of beets. This negligent operation of the beet car through the railroad yard, where section men were working, caused the car, quietly and without warning, to run down and strike the appellant in the back, knocking him down between the two rails and his right arm was caught between the southerly rail and

the southwesterly wheel of the car, crushing the same to require amputation at the shoulder. (T.R. 4-5)

On May 13, 1957, an action was filed, in the Federal District Court for Idaho, Southern Division, by McPherson against Union Pacific Railroad Company for $375,000.00, under the Federal Employers Liability Act, alleging railroad's employers liability for negligent use of its equipment and safe place to work failure. (T.R. 10-14) The railroad answered, denying liability and alleged the responsibility for the movement of the beet car was that of the Amalgamated Sugar Company. (T.R. 15-16) This case was tried to a jury, and by verdict filed September 14, 1957, McPherson was awarded $35,600.00 damages against the railroad (T.R. 18-19), and judgment was entered on the verdict for McPherson on September 14, 1957, for $35,600.00 and interest at the rate of 6% per anum from September 14, 1957 and for costs, against the railroad. (T.R. 19-20)

On November 12, 1958, McPherson, the appellant, filed this action against Amalgamated Sugar Company for $338,000.00, as the balance of his damages unrecovered from the railroad company. (T.R. 3-7)

On November 28, 1958, a motion to dismiss was filed by appellee Amalgamated Sugar Company on the grounds that the complaint failed to state a claim upon which relief could be granted. (T.R. 7) Filed with the motion, in support thereof, was the affidavit of Dale Clemons, attorney for Amalgamated Sugar, reciting facts about the appellant's case against Union Pacific Railroad (T.R. 8-9), together with a copy of the complaint in that action, (T.R.

10-14), the answer of the railroad company (T.R. 15-17, and instruction (T.R. 17-18), the verdict (T.R. 18), the judgment (T.R. 19-20), and the satisfaction of judgment. (T.R. 20-21)

The satisfaction of judgment was made on March 20, 1959, when the amount of the judgment was $37,027.09, and it recited that Union Pacific Railroad Company had paid $36,460.50, and acknowledged satisfaction of the judgment against the railroad on that compromise basis. (T.R. 20-21)

A principal question involved in this appeal is the effect of this satisfaction of judgment against the railroad and its operation in favor of the appellee, and the issue is raised by the motion to dismiss. Appellee contends that the satisfaction of the partially paid judgment against the Union Pacific Railroad, would relieve it from any liability, and appellant contends it would not bar action against Amalgamated Sugar Company.

On this issue the District Judge made his order, on December 31, 1958, on the motion to dismiss which, by request of counsel for appellee, he treated as one for summary judgment. (T.R. 22) He recited in his order that "the judgment obtained in the railroad case was fully satisfied," and although it may be that "the plaintiff reduced the interest," he "received full payment for the damages awarded by the jury." (T.R. 23) Thus the court held that interest is not part of the judgment. The District Judge further ruled that "we do not have a situation of partial satisfaction of a judgment against one of the joint tort-

feasors." (T.R. 24)

Then the District Judge ordered that the motion of the defendant (to dismiss) be and was granted. (T.R. 25) On January 6, 1959, judgment was entered which recited that the matter came on before the Court on "Defendant's Motion for Summary Judgment, * * * it is the determination of this court that the motion for summary judgment is well taken, and the defendant is entitled to a judgment of dismissal." Following which the Court ordered, adjudged and decreed the action, "dismissed with prejudice." (T.R. 26)

Another principal question is presented by the granting of the motion to dismiss when being treated as a motion for summary judgment. Appellant contends that the motion to dismiss should not have been granted.

III

SPECIFICATIONS OF ERROR

1. The District Court erred in holding that the judgment against the railroad had been fully satisfied.

2. The District Court erred in holding that accrued interest was not part of the judgment obligation.

3. The District Court erred in holding that the satisfaction made was not a partial satisfaction of a judgment against one of joint tort-feasors.

4. The District Court erred in ordering that the motion to dismiss be granted.

5. The District Court erred in entering a judgment of dismissal with prejudice, after the motion was treated as one for summary judgment.

SUMMARY

A.

Partial payment in fact of a judgment against one of two joint tort-feasors, with all the consideration being furnished by the judgment debtor, a satisfaction by the judgment creditor of the judgment on the compromise basis, short of full payment, will not operate to discharge the other tort-feasor who furnished no consideration and was not intended to be released. The injured party can proceed against the other tort-feasor with a credit to his damage of the amount paid for the satisfacion.

B.

As the motion to dismiss under Rule 12 (b) was treated as one for summary judgment as if under Rule 56, it was error to grant the motion to dismiss and not enter a summary judgment.

ARGUMENT

A.

The judgment against the railroad (T.R. 19-20) provided for recovery of $35,600.00, with interest at 6% per annum from September 14, 1947, and costs, and such interest and costs became a legal incident of the judgment, and a substantive part of the judgment obligation, which

would require payment for full satisfaction. The amount due on the judgment at the time of the satisfaction was $37,027.09 on March 20, 1958, and the time for appeal had not expired when the compromise settlement of $36,460.50 was made, thus the full judgment obligation was not in fact paid. (T.R. 20-21)

In *Hall vs. Citizens' State Bank of Superior*, Neb. 1932, 241 N.W. 123, the Supreme Court of Nebraska held:

> "This court has indicated and by the great weight of authorities it seems impossible to separate the judgment and interest accruing thereon. Such interest is a part of the judgment itself for which execution may issue upon request."

Although courts seem to differ in terminology as to whether interest is an actual part of the judgment, some saying it is, and some not, there is no authority that interest is not a legal incident of the judgment and part of the obligation involved in full satisfaction.

This elementary rule was succinctly stated in the early case of *Fitzgerald vs. Caldwells Executors*, Pa. 1802, 4 U.S. 251, wherein it was held:

> "Interest is, therefore, generally speaking, a legal incident of every judgment."

The Fitzgerald case recognized that the right may be suspended by agreement of the parties, and such occurred when this appellant satisfied the judgment against the railroad less full payment of the judgment obligation, and although the railroad was entitled to such satisfaction of the judgment, this could not operate to relieve appellee

of its liability as joint tort-feasor as no part of the consideration for the contractual satisfaction had been supplied by appellee.

Satisfaction for partial payment of the obligation of a judgment against one of two joint tort-feasors will not operate to discharge the other even though the unpaid portion was accrued interest on the judgment. A leading case of *Lovejoy vs. Murray*, 1865, 3 Wall. U.S. 1, holds:

> "We are therefore of the opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment in trespass, offered as a bar in an action against another joint trespasser, who was not a party to the first judgment."

Stusser vs. Mutual Union Ins. Co., 127 Wash. 449, 221 Pac. 331 (1923), holds:

> "It seems to us that it is also a well-settled general rule of law that a partial release by the injured party of one or more joint tort-feasors has no greater effect than releasing the other joint tort-feasors pro tanto, and that to whatever extent such expressly released joint tort-feasors remain liable to the injured party, so will the other joint tort-feasors remain liable to the injured party. There are decisions seeming to recognize exceptions to this general rule; but, where the amount of the injured party's damages, as against all the joint tort-feasors, has become fixed by judgment before the execution of such partial release, as in this case, no exception to this general rule obtains. 23 R.C.L. 405. Counsel for the insurance company seem to rely upon our decision in Larson v Anderson, 108 Wash. 157, 182 Pac. 957, 6 A.L.R. 621, as lending support to their contention that the acceptance of pay-

ment from the owners of the truck and the release of the judgment as against them to the extent of $5,-336.80 by appellants was in legal effect an entire release and satisfaction of the judgment as against the insurance company. But the argument, we think, overlooks the fact that that was only a partial release and satisfaction of the judgment as against the owners of the truck; they remaining still bound to pay the judgment in so far as it remained unsatisfied."

In this Ninth Circuit Court of Appeals is found good authority for the appellant's right to prosecute this action; and in *Huskey Refining Co., vs. Barnes*, 119 F (2d) 715 (C.A. 9, 1941) where Union Pacific Railroad had been released by a workman under Federal Employers Liability, it is held: (Release and compromise satisfaction of judgment are comparable)

"A further point under this head remains to be considered. In the case of Young v Anderson, supra, the Idaho Court, speaking through Judge Rice, said that, whether the tort-feasors be joint or independent, the injured party is entitled to no more than compensation for his injury; and that consideration received from one, for the release of any claim against him, operates to reduce pro tanto the amount recoverable from the other. That, of course, is the rule generally."

The case of *Young vs. Anderson*, 33 Ida. 522, 196 Pac. 193 (1921) holds:

"Since, however, appellant was only entitled to receive compensation for his injuries received, the consideration received from the Boise Valley Traction Company for the release of any claim against it operated to reduce pro tanto the amount of any damages

he was entitled to recover against any other tort-feasor responsible for his injuries, and this is true whether the tort-feasors be joint or independent. The release, therefore, was admissible in evidence."

Friday vs. United States, 239 F (2d) 701, (C.A. 9, 1957) reversed a summary judgment for the defendant where plaintiff had received partial payment for his damages received in an automobile collision, by holding:

"In a case involving tort-feasors, the Idaho Court has held that a release of one releases the other only where the release purported by its terms to indemnify the plaintiff completely for his loss. The Court stated the rule by quoting a California case involving 'joint tort' feasors as follows:

'The applicable law is thus conclusively stated: Even if it were to be conceded that the City of Los Angeles was a joint tort-feasor with these appellants and that same liability rested upon it as such for her injuries, it is well settled rule that before one joint tort-feasor can be held to be discharged from liability through the release of another, the consideration for such must have been accepted by the plaintiff *in full satisfaction* of the injury. (emphasis added) * * * Wallner v Barry, 207-Cal-465, 279-Pac-148 at page 151.'

"Valles v Union Pacific Railroad, 1951, 72-Ida-231, 239, 238 P2-1154, 1159. It was unnecessary in that case to apply this rule to joint tort-feasors, since the case involved independent tort-feasors, and the Court expressly stated that it held 'neither way * * * as to joint tort-feasors."

"The above dictum of the Valles case, citing the

California rule that the injuries themselves shall be fully compensated in both independent and in joint negligence settlements of claims was preceded in another Idaho case by an even more striking dictum in a separate tort-feasor case, stating that in both separate and joint tort-feasor cases the settlement with one reduces the liability of the other only to the extent of the amount paid. In Young v Anderson, 33-Ida-522, at page 524, 196-P-193 at page 194, 50-ALR-1056, the Court stated:

> 'Since, however, appellant was only entitled to receive compensation for his injuries received, the consideration received from the Boise Valley Traction Company for the release of any claim against it operated to reduce pro tanto the amount of any damages he was entitled to recover against the other tort-feasor responsible for his injuries, and this is true whether the tort-feasors be joint or independent.'

"We are more impressed that these dicta state the law of Idaho by the following language of the Court in the Valles case in concluding its opinion in 72-Idaho at page 240, 238-P2 at page 1160:

> 'Too many courts in maundering on this subject have made such a fetish of the pat phrase "there can be but one recovery for a tort" they have lost sight of and ignored *the fundamental factor in even-handed justice that it is as imperative that the tort claimant shall receive full compensation* (emphasis added), as it is that the tort-feasor shall not pay twice or more than the *full* award determined judicially or otherwise, as a unit or piecemeal.'

"This language accords with Wigmore's statement

> of the rule that a release to one of several joint tort-feasors is a discharge to all is merely a 'surviving relic of the Cokian period of metaphysics'."

This Friday case remains the rule of this jurisdiction although there are different rules elsewhere.

In *Garvin vs. Osterhaus*, 125 F. Supp. 729 (U.S.D.C. Conn., 1954), the court in holding motions for summary judgment should be overruled where there was no showing that judgment on the merits had been fully paid, said:

> "The defendant's naked allegation that plaintiffs received a 'substantial sum of money' in settlement at the time of plaintiffs motions to dismiss the other defendants, with prejudice, does not establish that plaintiffs' causes of action have resulted in judgment and satisfaction, and therefore bar to plaintiffs' claims against the instant defendant."

Satisfaction and release of rights against joint or concurrent tort-feasors rests in contract which requires consideration moving from the one asserting the satisfaction or release, and depends upon intention of the parties. *Skut vs. Hartford Accident & Indemnity Co.*, 142 Conn., 398, 114 A (2d) 681 (1955) holds that for partial satisfaction of a judgment to be treated as full satisfaction as to other tort-feasors, such must appear to be the intention of the parties.

The satisfaction of appellant was drawn to show it was not full payment of the judgment obligation and specified the exact amount received and from whom with intent to preserve and not to relinquish rights against the other tort-feasor, appellee here. (T.R. 20-21) These facts were known

and understood between appellant and the railroad which supplied all the consideration for the satisfaction and release of liability on the judgment against it, and the railroad had failed in its eforts to get the appellee to participate by contribution of funds, as it considered the appellee responsible for the operation of the car causing the injuries. (T.R. 15-16) Judgment existed against the railroad and any settlement would entitle it to record of satisfaction, but anything short of full payment of the judgment could not operate under the rules of the law to relieve the appellee that had sustained no detriment to support contractual release by way of the satisfaction of the judgment against the railroad, and no intention to release appellee can be found from the facts here.

In *Gronquist vs. Olson*, 242 Minn. 119, 64 NW (2d) 119 (1954), in holding on a similar situation, said:

> "We believe that the factors determinative of whether a release of one of several joint tort-feasors will operate to release the remaining wrongdoers should be and are: (1) The intention of the parties to the release instrument, and (2) whether or not the injured party has *in fact received full compensation* (emphasis added) for his injury. If we apply that rule, then where one joint tort-feasor is released, regardless of what form that release may take, as long as it does not constitute an accord and satisfaction or an unqualified, or absolue release, and there is no manifestation of any intention to the contrary in the agreement, the injured party should not be denied his right to pursue the remaining wrongdoers until he has received full satisfaction. * * * How can the appellant complain of the other party jointly liable has paid part of the dam-

> ages? He has not been prejudiced by the settlement, but on the contrary has been benefited for he is entitled to have the amount of the judgment reduced by the amount paid by his co-tort-feasor."

State vs. Sims, 139 W.V. 92, 79 S.E. (2d) 277, holds that a judgment against one of several tort-feasors must be fully satisfied to constitute a bar against another joint tort-feasor, and in the opinion said, at page 291:

> "A judgment against one joint trespasser is no bar to a suit against another for the same trespass; nothing short of full satisfaction, or that which the law must consider as such, can make such a judgment a bar."

And at page 292

> "The rule prevailing in this jurisdiction that a judgment against one joint tort-feasor is not a bar to a suit against another joint tort-feasor for the same tort, and *nothing short of full satisfaction* (emphasis added), or that which the law must consider as such, can make the judgment a bar to a subsequent action, is, in our opinion, just and reasonable, and is supported by the great weight of authority in the United States."

In *Valles vs. Union Pacific Railroad Company*, 72 Ida. 231, 238 Pac. (2d) 1154, the Idaho Supreme Court said:

> "It is a well settled rule that before one joint tort-feasor can be held to be discharged from liability through the release of another, the consideration for such release must have been *accepted by the plaintiff in full satisfaction* (emphasis added) of the injury."

There is nothing that will support the position that appellant accepted the settlement from the railroad in full satisfaction of the judgment on his claim against the ap-

pellee. While the adequacy of damage award may create issue in subsequent action against concurrent or joint tort-feasor, prior partial payment of a judgment will not be a bar to the action. *Black vs. Martin*, 88 Mont. 256, 192 Pac. 577 (1930).

The District Judge here had previously decided, *Viehweg vs. Mountain States Tel. & Tel. Co.*, 141 F. Supp, 846 U.S.D.C. Ida., 1956), and held by his order (T.R. 24) that the instant case falls within the *full satisfaction* rule of that case. The two cases are distinguished, however, by the records showing that in the Viehweg case there was *full* satisfaction of the judgment in fact, and in the McPherson case there was not *full* satisfaction of the judgment in fact. This vital distinction is the crux of the reason why appellant still has a valid cause against appellee and his case was improperly dismissed.

B.

The appellee's motion to dismiss was improperly granted for the reasons stated in the foregoing portion of this brief, however, there has been additional error in dismissing the action when procedurally the motion to dismiss was treated as one for summary judgment under Rule 12 (b) of the Federal Rules of Civil Procedure.

The appellee asked the court to treat its motion to dismis under Rule 12 (b) as a motion for summary judgment as if under Rule 56, and submitted the affidavit of Dale Clemons with exhibits "A" to "F" inclusive, attached thereto (T.R. 8 to 22 inc.), and the court treated the motion as one for summary judgment. (T.R. 22-25 But by his

judgment (T.R. 25-26), the court dismissed the action with prejudice, whereas Rule 56 requires that the court should determine whether the complaint, the affidavit, and exhibits showed there was no genuine issue as to any material fact and that the moving defendant was entitled to judgment as a matter of law. This is error, and has so been ruled by this Ninth Circuit Court.

Mantin vs. Broadcast Music, Inc., 248 F. (2d) 530 (C.A. 9, 1957), appears to be in point with the instant case concerning the erroneous procedure, and indicates the need for its reversal. In holding that where a motion for dismissal for failure to state claim on which relief can be granted, matters outside the complaint were presented to, and considered by the court, determination must be made as to whether the complaint and other matters considered show any genuine issue as to any material fact, and whether the moving defendant is entitled to judgment as a matter of law, the court said:

> "The motion * * * was * * * to dismiss the action for failure of the complaint to state a claim upon which relief could be granted. On this motion matters outside the complaint were presented to and not excluded by the District Court. Therefore the District Court was required by Rule 12 (b) to treat the motion as one for summary judgment; dispose of it as provided in Rule 56; give plaintiff and the moving defendants reasonable opportunity to present all matters made pertinent to such a motion by Rule 56; thereupon determine whether the complaint, the depositions, if any, the admissions, if any, the affidavits of Kirby and Janssen and the other affidavits, if any,

showed that, as between plaintiff and the moving defendants, there was no genuine issue as to any material fact, and that the moving defendants were entitled to a judgment as a matter of law; if so, render such judgment forthwith; and if not, deny the motion."

"Instead of doing what Rule 12 (b) required, the District Court treated the motion as nothing but a motion to dismiss the action for failure of the com plaint to state a claim upon which relief could be granted and, so treating the motion, granted it and entered the judgment here appealed from—a judgment dismissing the action for failure of the complaint to state such a claim. This was in error."

"Judgment reversed and case remanded for further proceedings in conformity with this opinion."

Thus the District Court here erred in failing to render judgment under Rules 12 (b) and 56, and by dismissing the action, and the judgment of dismissal should be by this Circuit Court reversed.

DATED at Boise, Idaho, June 13, 1959.

Respectfully submitted,

BRUCE BOWLER
244 Sonna Building
Boise, Idaho

Attorney for Appellant

Due service and receipt of 3 copies of the foregoing

Appellant's Brief is hereby admitted this_____day of June, 1959.

CLEMONS, SKILES & GREEN

By_____

Attorneys for Appellee

No. 16409

IN THE

United States

Court of Appeals

For the Ninth Circuit

MYRON E. McPHERSON,

Appellant,

vs.

AMALGAMATED SUGAR COMPANY,
a corporation,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho, Southern Division

HONORABLE FRED M. TAYLOR, JUDGE

BRUCE BOWLER
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Clerk

Filed

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BRIEF OF APPELLEE

JURISDICTION

The District Court had jurisdiction under 28 U.S.C.A. 1332, there being a diversity of citizenship (T.R. 3-4) and the amount in controversy, exclusive of interest and costs exceeding $10,000.00. (T.R. 4).

This court has jurisidiction to hear this appeal under 28 U.S.C.A. 1291, 2107 and Federal Rules of Civil Procedure, Rule 73.

STATEMENT OF CASE

A. PRIOR COURT ACTION AND SATISFACTION OF JUDGMENT.

Prior to the filing of the present action, the same plaintiff on May 13, 1957, filed in the District Court for the District of Idaho a complaint in Case No.

3341, naming the Union Pacific Railroad Company as defendant (T.R. 10-14), and in that action this same plaintiff alleged that he was an employee of the Union Pacific Railroad Company, employed at Gooding, Idaho, and that on November 13, 1956, a freight car loaded with beets was set in motion by means of a pinch bar and being operated by an agent of defendant, Union Pacific Railroad Company (T. R. 11), was driven into, upon and against the plaintiff. Plaintiff asked for damages in the sum of $375,000.00.

The defendant, Union Pacific Railroad Company, answered in Case No. 3341 (T.R. 15-17), putting into issue the allegations of plaintiff's complaint, and thereafter Case No. 3341 proceeded to trial, before a jury, and on September 14, 1957, the verdict of the jury was returned, assessing damages against the defendant, Union Pacific Railroad Company, in favor of plaintiff, in the sum of $35,600 (T.R. 18-19), and judgment was entered in the District Court for that amount (T.R. 19-20).

On March 25, 1958, there was filed in the District Court a satisfaction of judgment in Case No. 3341, showing payment and satisfaction to plaintiff in the sum of $35,600.00, together with $313.80 court costs and $546.70 interest, and the plaintiff, Myron E. McPherson, duly acknowledged satisfaction of said judgment which provided that "satisfaction of said judgment is now hereby acknowledged, and the clerk of said court is hereby authorized and directed to

enter of record, satisfaction of said judgment." (T. R. 21)

B. PRESENT ACTION

On November 12, 1958, the complaint in the present action was filed in the same District Court for Idaho, as case No. 3490, by the same plaintiff, Myron E. McPherson, naming the Amalgamated Sugar Company as defendant (T.R. 3-7). The plaintiff in this action alleged that on November 13, 1956 the plaintiff was an employee of Union Pacific Railroad Company, working in the railroad yard at Gooding, Idaho. That on that date a freight car loaded with beets was set in motion by means of a pinch bar and being operated by an agent of defendant, Amalgamated Sugar Company was driven into and against the plaintiff (T.R. 4). Plaintiff asked damages in the sum of $338,000.00 (T.R. 6).

To the above-mentioned complaint in this action defendant filed a motion to dismiss under Rule 12 (b) (6) and by the motion the prior action, case No. 3341, against the Union Pacific Railroad Company, the issues joined in that action by the complainant, answer and instructions of the court, the verdict, judgment and satisfaction of judgment were presented by affidavit (T.R. 8-22).

SUMMARY

Defendant-Appellee herein contends that the judgment and satisfaction of judgment in case No. 3341 against Union Pacific Railroad Company is a bar to any proceedings against this defendant-appellee.

The issue to be determined is whether the appellant may have his damages again judicially determined after having had a judicial determination against one of two joint tort feasors, which determination was against a solvent defendant and which determination was paid and satisfaction of judgment entered of record.

ARGUMENT

I

SATISFACTION OF JUDGMENT RAISES CONCLUSIVE PRESUMPTION THAT CLAIMANT HAS BEEN PAID IN FULL.

We commence with the preface that: (1) One wronged can recover only once for one wrong; (2) Joint tort feasors may be separately or jointly liable for the whole of the wrong; but, (3) Recovery may be obtained only once against joint tort feasors. This necessarily follows for although the courts are ardent in their endeavor to direct that one recover full compensation for an injury, they are as zealous in directing that tort feasors shall not be compelled to pay twice for the same wrong.

And, satisfaction of a judgment obtained against one of the two or more joint tort feasors operates as a satisfaction against all. This follows, as it must be presumed that satisfaction of the judgment would not have been entered by the claimant unless or until payment had been made in full, and in Adams v. Southern Pacific Company, 204 Cal. 63, 266 Pac.

541, the California Court, quoting in turn from Tompkins v. Clay Street Railroad Company, 66 Cal. 163, 4 Pac. 1165, said that this presumption is conclusive (emphasis supplied):

> "Every party contributing to the injuries of plaintiff was liable to the full extent of the damages by her sustained. Her injuries gave her but a single cause of action. If she had brought a separate action against the Sutter Street Company, and recovered a judgment therein, and such judgment had been satisfied, she could not subsequently have maintained another action for the same injuries against the Clay Street Company, *inasmuch as the conclusive presumption would be that she had already received full compensation for all damages by her sustained.* Damages resulting from the same wrongful transaction are ordinarily inseparable; she could not recover part from one and part from the other defendant. * * * It is to be observed, when the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more of the others, *that the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent.*"

The Supreme Court of Washington in Abb v. Northern Pac. Ry. Co., 28 Wash. 428, 68 Pac. 954, held likewise when it said (emphasis supplied):

> "... The release was held to be a bar to an action

for the same injuries against the other company. The opinion says: 'The court below held very properly that this agreement and release was a bar to a recovery in this action. The plaintiff had received one satisfaction. He was not entitled to a second.' In Turner v. Hitchcock, 20 Iowa, 310, 317, 318, Mr. Justice Dillon, in a well-considered opinion, says upon this subject: 'It is also an undisputed principle of the common law that, as a general rule, the release of one joint wrongdoer releases all. The rule and the reason for it are thus stated in a work of high authority: "If divers commit a trespass, though this be joint or several, at the election of him to whom the wrong is done, yet if he releases to one of them, all are discharged, because his own deed shall be taken most strong against himself." Also (which seems to be the better reason) such release is a satisfaction in law which is equal to a satisfaction in fact. Bacon's Abr. tit. 'Release,' B. * * * "The reason of the rule" that the release of one is the release of all "seems," says Bronson, J., with his accustomed clearness and force ([Bronson v. Fitzhugh] 1 Hill, 185, supra), "*to be that the release being taken most strongly against the releasor is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort feasors,* no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done." ' In

Railroad Co. v. Sullivan (Colo. Sup.) 41 Pac. 501, it was held that, where two railroad companies were jointly liable for injury to a person, a release by such person of his right of action against one of the companies also released the other. The following cases are also directly to the same point, and strongly support the same rule: Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. 1165; Goss v. Ellison, 136 Mass. 503; Donaldson v. Carmichael (Ga.) 29 S. E. 135."

The above-cited California and Washington cases are the forerunners in those states and have been cited and followed in numerous cases in many jurisdictions.

The Supreme Court of New Hampshire in Colby v. Walker, 86 N.H. 568, 171 A. 774, recognized not only that the giving of a release raises a presumption that it is in exchange for full payment, but also held that satisfaction of a judgment is a complete discharge:

"It appears to be the rule established by several decisions that if there is nothing in the release from which a different intent may be inferred, the conclusion that it was given in exchange for full compensation for the damages to which it relates follows as a matter of law.

The declaration that compensation is of controlling importance is supplemented by the rule that a general release imparts such compensation.

***

The judgments which were entered in the suits against Wilson stand somewhat differently. It is the law here that a judgment on the merits against one liable for a tort, followed by satisfaction, works a discharge of others similarly liable for the same injury. Zebnik v. Rozmus, 81 N.H. 45, 124 A. 460. Although the judgments here involved were entered by agreement, they were judgments concerning the merits of the case, and are of the same virtue as though rendered upon verdicts of juries. ***

On the record as it stands, Walker would be discharged by the satisfied judgments against Wilson and the ruling of the Superior Court was correct."

II

ACCORD AND SATISFACTION

The Court of Appeals of Maryland in Lanasa v. Beggs, 159 Md. 311, 151 A. 21, reviewed at length authorities holding that where a complete release or satisfaction of claim is given to one joint tort feasor, it is actually accord and satisfaction and operates as a full and complete satisfaction to all of the joint tort feasors. The court said in part:

"* * *Although the rule in this jurisdiction is that the injured party may bring separate suits against the wrongdoers, and proceed to judgment in each, and that no bar arises as to any of them until satisfaction is received, yet the party injured

may have but one satisfaction. So, if as a matter of fact, the wronged party has actually received satisfaction, or what in law is regarded as its equivalent, from one tort feasor, he is barred from proceeding against the other tort feasors. ***

'This court said in *** when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same injury.' And in *** 'The reason for this rule is apparent. It is neither just nor lawful that there should be more than one satisfaction for the same injury whether that injury be done by one or more.' *** In the case first cited Whitehouse, J. speaking for the Supreme Court of Maine said *** 'In either case the sufferer is entitled to but one compensation for the same injury, and full satisfaction from one will operate as a discharge of the others.' ***

This full satisfaction may assume the form of either a release, as in Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504; of an entry of settlement upon a court docket in a pending action, as in Cox v. Md. Elec. Rwys. Co., 126 Md. 300, 95 A. 43; of a payment or tender of the amount of a judgment previously recovered against a joint tort feasor, as in *** or of an accord and satisfaction, as in *** Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704 *** While the full satisfaction may be made by these various ways, every one has the

effect and quality of its form, and, so if the way be by release under seal, the rules applicable to specialties will prevail, but, if by parol, the rules pertaining to that form of agreement will govern.***"

In Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704, at page 707 of the Pacific Report (emphasis supplied):

" '***This claim was purely for unliquidated damages occasioned by a tort.' While plaintiff may sue one or all of joint tort feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. Where several joint tort feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. The reason is quite obvious. *By his withdrawal, plaintiff announces that he has received satisfaction* for the injury complained of, and it would be injust that he should be allowed double payment for the single wrong. *It matters not either whether the payment made was in large or small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against all.*"

In Kaplowitz v. Kay, 70 Fed. 2d 782, it was said:

"It is settled law that: 'The release of one joint tort feasor, or the satisfaction of a judgment against one, releases all from liability. *** 'In cases of joint torts, the injured person may sue one, or any number less than all, of the joint tort feasors, or may sue all; and, where there is one injury, there can be but one satisfaction. If the injured person executes a release to one of the joint tort feasors, it operates to bar an action against the others, for the reason that the cause of action is satisfied and no longer exists.' "

The Supreme Court of the United States in Sessions v. Johnson (1877) 95 U.S. 347, 24 L. Ed. 596, said:

"Joint wrong-doers may be sued separately; and the plaintiff may prosecute the same until the amount of the damages is ascertained by verdict, but the injured party can have only one satisfaction, the rule being that he may make his election de melioribus domnis, which, when made, is conclusive in all subsequent proceedings.***"

Thus, having made his election, and having entered of record a satisfaction of judgment such election, so says the Supreme Court of the United States, is conclusive. And in the language of the Maryland Court, Lanasa v. Beggs, supra, and the California Court, Chetwood v. California Nat. Bank, supra, is complete and full payment in accord and satisfaction. Like authority is Flynn v. Manson 19 Cal. App. 400, 126 P. 181; Pellet v. Sonotone Corporation

(Cal) 151 P.2d 912, reversed on other grounds 160 P.2d 783, and Clabaugh v. Southern Wholesale Grocers Ass'n, 181 Fed. 706.

III

INJURY BY JOINT TORT FEASORS RESULTS IN ONE CAUSE OF ACTION — ONE CAUSE OF ACTION CANNOT BE SPLIT.

In Cain v. Quannah Light and Ice Co., 131 Okl. 25, 267 Pac. 641, plaintiff recovered judgment against one joint tort feasor which judgment was satisfied, but "The judgment, however, contained the provision that 'the same should be without prejudice to plaintiff's rights against the Quannah Light and Ice Company." The court, after citing numerous authority, first recognized the rule that:

> " 'The general theory expressed in the foregoing cases finds support in a practically uniform line of authorities holding that the acceptance of satisfaction of judgment against one of two or more joint tort feasors is a bar to any further proceedings against the other tort feasors, except for costs.' "

Then, as to plaintiff's contention in the Cain case that "a partial satisfaction of a joint judgment by one judgment debtor and a release from further liability as to such judgment debtor will not operate as a bar as to other judgment debtors," the court continued:

"***In the cases cited by plaintiff, the claims were not reduced to judgment, and settlement and release were made prior to judgment; there was no settlement of the cause of action.

It must be borne in mind that there was but one cause of action and, while the plaintiff might have proceeded separately against all and recovered judgment against all, yet there could be but one satisfaction."

Which is to say that if appellant herein, McPherson, had recovered judgments in separate suits against Union Pacific Railroad and this appellee, Amalgamated Sugar Co., the satisfaction of the judgment against one would satisfy the other which is according to reason. Then commenting on plaintiff's claim, in the Cain case, that it was not her intention to release the joint tort feasor the Oklahoma court said:

"But it is argued that the defendant did not intend to recover her full damages in her former suit against the gypsum company, that the judgment rendered was an agreed judgment *** a compromise *** without prejudice to the rights of the plaintiff as against this defendant, and the judgment so provides.

"The answer is: The question here involved is not a question of her intention; it is a question of her legal right to split her cause of action, to apportion her damage and to recover by separate actions separate portions thereof. Plaintiff had

but one cause of action. This cause of action, of course, existed against all wrongdoers, but it was a single cause of action and when suit was filed *** and such claim rendered to judgment, the cause of action then merged in the judgment, and the satisfaction of the judgment was a satisfaction and settlement of the cause of action.

"The plaintiff having no legal right to split her cause of action, the court by its judgment could legally grant such right, if, in fact, it so intended. It must be borne in mind that it is not the rendition of the judgment that operates as a bar, but it is the satisfaction thereof. If the court by its judgment intended to reserve to the plaintiff the right to proceed against this defendant, after full and complete satisfaction of the judgment, this portion of the judgment would be inoperative as beyond the power of the court to render.***"

The reasoning in the Cain case is particularly applicable in the present case. Plaintiff had but one cause of action. Plaintiff sued the railroad company and recovered a judgment by a verdict of the jury as to the amount plaintiff was entitled to. That judgment has been satisfied, and in the words of the Oklahoma Court, the satisfaction was a satisfaction not only of the judgment, but "of the cause of action."

Cain v. Quannah Light and Ice Co. is cited with approval by the Utah Court in Dawsen v. Board of Education, etc., 118 Ut. 452, 222 P.2d 590, wherein it was said in part:

"(1) A person injured by a joint tort has a single and indivisible cause of action. In the case of Green v. Lang Co., Inc., et al, Utah, 206 P.2d 626, 627, Mr. Justice Wade, speaking for this court, passed on a similar principle and announced the rule in this jurisdiction in the following language:

*"It is well established that there can be but one satisfaction for injuries sustained in one wrong.****

*"When a right of action is once satisfied it ceases to exist.****

"(2) Having a single cause of action against more than one tort feasor, an injured party may proceed against the wrongdoers either jointly or severally and he may recover judgment or judgments against one or all, but he can have but one satisfaction of the cause of action. If the cause has been satisfied in full, the injured party can proceed no further. He has recovered all the law permits."

As to the amount of the damages, the court said in effect that when the amount had been established by the jury, that amount was conclusive.

"***Any uncertainty as to the amount of his loss was made certain by the judgment and so no contention can be made that a part payment only was received. A judgment rendered against one of two or more joint tort feasors is a conclusive

determination of the measure of damages until or unless reversed upon appeal. *** He might have sought a new trial on the grounds of the inadequacy of the damages and appealed to this court from the insufficiency had he been dissatisfied with the ruling. He did not, however, choose to follow that course***."

The Utah Court in the Dawson Case also cited with approval the case of Eberle v. Sinclair Prairie Oil Co., 120 F. 2d 746, 749, 135 A.L.R. 1494. In that case, plaintiff and two of the joint tort feasors entered into a compromise and settlement, the plaintiff reserving her right to proceed against the other tort feasors, and obtained the approval of the compromise and settlement by the District Court of Seminole County, Oklahoma. The United States Circuit Court of Appeals, 10th Circuit, said:

"***The effect of the settlement and compromise of the causes of action, the receipt of the sum stipulated, the judgment approving the compromise of the causes of action and dismissing the action with prejudice was an extinguishment of the two single causes of action. The causes of action having been extinguished, the district court of Seminole County, Oklahoma, was powerless to reserve the right in the administratrix to prosecute another suit on the same causes of action against Sinclair and Gray."

Similar and conclusive authority is Viehweg v. Mountain States Tel. and Tel. Co., 141 Fed. Supp.

848, decided by Judge Taylor in 1956; City of Wetunka v. Cromwell Franklin Oil Co., 171 Okl. 565, 43 P.2d 434, and Sykes v. Wright, 201 Okl. 346, 205 P.2d 1156 where the "judgment and determination by the court was followed in the journal entry by a reservation to plaintiff of the right to proceed by action against J. G. Wright and his insurance carrier."

The court said that:

> "***The judgment entered in this case was upon the merits and issues joined by the pleadings. The judgment determined the amount all persons dependent on the deceased were damaged. This extinguishes the cause of action and no justicable claim against others jointly and severally liable for the tort remains."

IV

CLAIMANT IS ESTOPPED FROM FURTHER ACTION AFTER JUDGMENT IS OBTAINED AGAINST A SOLVENT JUDGMENT DEBTOR

In McNamara v. Chapman, 81 N.H. 169, 123 A. 229, 31 A.L.R. 188, it was held that where a prior judgment had been obtained against a solvent master for the tort of the servant, that such prior judgment was a bar to a later action taken against the servant even though the prior judgment had not been satisfied. On this point the court said:

> "The plaintiff has had a full and complete fair trial of his claim for compensation, resulting in

a judgment in his favor, which the defendant is ready and willing to pay. Unless there is some positive rule of law which forbids, this ought to be the end of the case. If the rule that in the case of joint wrongdoers the plaintiff may severally pursue one after another to judgment, refusing to accepted tendered payment of the earlier judgment. (McDonald v. Nugen, 118 Iowa 513, 96 Am. St. Rep. 407, 92 N.W. 675; Blann v. Crocheron, 20 Ala. 320), is the law in this state, it ought not to be extended. It should not be applied to cases not clearly falling within its scope, nor when its application will impose an elsewhere unheard of liability."

Judicial cognizance may surely be taken of the solvency of the Union Pacific Railroad in relation to a judgment in the amount of $35,600.00. It would be against good reason and unconscionable that one injured could have his day in court, receive a judgment based upon the verdict of a jury against a defendant entirely solvent and able to pay, and then by the waiver of a part of costs or interest subject others to retrial on the same issues.

Although the New Hampshire court stated that master and servant were not joint tort feasors, that should not be the rule in this jurisdiction (Judd v. Oregon Shortline Railway, 4 F. Supp. 657) and the McNamara case should be authority that when one elects to submit the question of damages to the trior, he is barred by the decision of that trior.

V

WAIVER OF INTEREST—CONSIDERATION FOR SATISFACTION

Plaintiff, in this action, contends that he did not collect all of the interest due him. This does not appear from the satisfaction. It is only after further evidence of actual date of payment and by mathematical computation that such can be determined. Plaintiff also contends that the interest is a legal incident of the judgment. With this we are inclined not to disagree, for we think, the satisfaction of judgment satisfied all "incidents" thereof. Repeating from Chetwood v. California Nat. Bank, supra:

> "***It matters not either whether the payment made was in large or small amounts. If it be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against all."

We disagree, however, with appellant's statement (Brief, page 4) under appellant's statement of the case that Judge Taylor held that the interest was not a part of the judgment. Judge Taylor said (Tr. 23), and rightly so, that "It may be that in accepting payment of this judgment the plaintiff reduced the interest that had accumulated to date of judgment, but he nevertheless fully satisfied the judgment and received full payment for the damages awarded by the jury."

And the statement made by Judge Taylor, is not without precedent. In Stibbin et al v. Fried, Crosby and Co., 185 Minn. 336, 241 N.W. 315, the Minnesota Court held that by entry of satisfaction of judgment the judgment creditor waived costs and interest:

> "***The two judgments have been paid in full, except for an item of $2 and interest thereon, arising from a charge of a fee of $1 on each of the two executions issued. (No levy appears to have been made.) But the judgments were satisfied pursuant to stipulation of counsel. They were discharged of record, and that ended all further obligation of plaintiffs as judgment debtors. The terms imposed were for the benefit of defendant. It was within its power to waive them or any part therein. It appears conclusively, we think, that it waived payment of the paltry $2 in question. In any event, the executions were made exactly nothing by the satisfaction of the judgments. They thereby became, and now remain, without force or effect of any kind.***"

The judgment in the instant case of damages, costs and interest were all for appellant's benefit in the Railroad Case. If he chose to waive costs, or to waive interests, or any part of either, it still remains that as to the Railroad Company the judgment was completely satisfied.

Nor is there merit to appellant's argument that the judgment was paid by the Railroad Company,

and not by this appellee. The same question was presented in Abb v. Northern Pac. Ry. Co., supra, and in Lesoski v. Anderson, 112 Mt. 112, 112 P.2d 1055, where it was held:

> "Plaintiff urges that no consideration moved from these defendants to the plaintiff, and that these defendants were not parties to the release. The only effect of such a showing would be to indicate that plaintiff did not intend to release them. *** In view of the theory upon which release of one joint feasor releases the other, that is, the claim has been fully satisfied, it is not necessary that any consideration move from the other feasor to the claimant.***"

VI

APPELLANT'S AUTHORITY AND COVENANT NOT TO SUE — DISTINGUISHABLE FROM THE FACTS OF THIS CASE.

In the first action, Case No. 3341, the action against the railroad company, the appellant in this action executed, under seal, to the railroad company, the joint tort feasor, a full and complete satisfaction of judgment (Tr. 20-21), and thereby released and extinguished any cause of action he had against that joint tort feasor.

But appellant contends that he has a right to now maintain another action against a separate joint tort feasor, and further contends that the payment

of judgment by the railroad company only operates to reduce pro tanto the liability of the separate joint tort feasor. Apparently appellant attempts to treat the satisfaction of judgment as a covenant not to sue.

The pro tanto payment doctrine comes into play only in the case of a covenant not to sue based upon a partial payment. There is a vast difference in the legal effect between a compromise partial settlement, or a covenant not to sue, on one hand, and a release, or a satisfaction of the claim, or what in law is equivalent to full payment, on the other hand. In the former it is only a partial payment, and the separate joint tort feasor cannot object because his liability is pro tanto lessened. But in the latter, the cause of action is extinguished.

In distinguishing between a release and a covenant not to sue, the Supreme Court of Tennessee, in Byrd v. Croucher, 166 Tenn. 215, 60 S.W.2d. 171, clearly stated the rule to be:

> "The first of these cases adheres to the common-law rule that the cause of action against joint tort feasors is indivisible, and that a release of one operates to release all. The reason for excluding a mere covenant not to sue from this rule was stated to be that the covenant does not 'have the effect, technically, of extinguishing any part of the cause of action.'
>
> This theory was observed in the second of the two cited cases, wherein this court held that a

covenant not to sue does not extinguish the cause of action; is not a defense to a suit on such cause of action; nor a satisfaction of the claim for damages; and may be pleaded by the covenantee only 'by way of set-off or recoupment.'

It is obvious, therefore, that the covenant before us contains an element not consistent with the nature of a mere covenant not to sue, in the stipulation that it 'may be pleaded as a defense to any action' which may be brought against the covenantee on the cause of action treated in the covenant.

Such a stipulation operates clearly to extinguish the cause of action which the plaintiff had against the covenantee. It expressly sets up and establishes a bar to the prosecution of any action which the plaintiff may bring in breach of her covenant, and was therefore intended as a satisfaction of such cause of action. The instrument was, therefore, in effect a release and not a mere covenant not to sue."

In Davis v. Buckeye Light & Power, 145 O.S. 172, 61 N.E.2d 90, a release was made without any reservation as to other tort feasors. The court recognized its earlier decisions to the effect:

"***Yet, 'where such written releases expressly provide that the release is solely and exclusively for the benefit of the parties thereto and expressly reserves a right of action as against any

other wrongdoer, such reservation is legal and available to the parties thereto.' "

However, the court said that there can only be one satisfaction, and a complete release of one tort feasor releases all tort feasors. Therefore, unless the reservation is clear, a presumption arises that the payment received was in full satisfaction (emphasis supplied):

"Although, under the facts disclosed by the record in the instant case, the amount to be awarded in full satisfaction of the damages sustained had not been ascertained in a trial and announced in a jury's verdict, the contract of settlement and release entered into contained no reservation or exception whatever. Again we recur to the opinion in the Adams Express Co. case for the statement of the principle which we feel particularly applicable here. It is as follows:

'If, however, the language of the release is unqualified and absolute in its terms, it may be fairly said that a presumption does arise that the injury has been fully satisfied, because the parties would not be presumed to split the redress into fractional parts. But such a presumption cannot arise where the very terms of the release are squarely to the contrary:

It is to be observed that the terms of the release under consideration by the court in that case were "squarely to the contrary" for it "particularly specified that such satisfaction was not to operate

as a satisfaction for the other defendants."

That the settlement was only in partial satisfaction could easily have been shown by other appropriate language.' "

We repeat, it is only where partial payment is made, and accepted as such, and where a covenant not to sue, as distinguished from a release, is given that the doctrine that the payment made by a joint tort feasor only operates to release pro tanto the liability of other joint tort feasors comes into play. Beedle v. Carolan 115 Mt. 587, 148 P.2d 559; Richardson v. Pacific Power & Light Co., 11 Wash. 2d 288, 118 P.2d 985; Haney v. Cheatham, 8 Wash. 2d 310, 111 P.2d 1003; McWhirter v. Otis Elevator Co., 40 F. Supp. 11; Black v. Martin, 88 Mt. 256, 292 P. 577; Lesoski v. Anderson, 112 Mt. 112, 112 P.2d 1055, wherein the rule was tersely stated as:

"***There is but one injury, for which each tort feasor is answerable in full, but, there being but one wrongful act, there can be but one full recovery, one complete satisfaction. When that is obtained the injured party has exhausted his remedy.***

Recently the courts have held that the release of one tort feasor does not necessary release the others. If from the language of the release it appears that it is not intended as full satisfaction of the claim arising out of the tort it does not have that effect, but the rule is that to save the right of recourse against the other feasors, the

release must be in the nature of a covenant not to sue or there must be words in the release which show that it is not in full satisfaction of the claim and that he does not thereby discharge the others from liability."

A general release by itself imparting consideration, (Colby v. Walker, supra), and the presumption being that it was given in consideration of full payment, it is incumbent upon the one executing the release to expressly reserve his right of recourse, if he intends such a reservation. But whether the instrument does, in law, reserve such right, or whether such a right can, in law, because of the nature of the instrument, be reserved is a matter for the court to determine. Cain v. Quannah Light and Ice Co., supra; Eberle v. Sinclair Prairie Oil Co., supra; Viehweg v. Mountain States Tel. and Tel. Co., supra; Clabaugh v. Southern Wholesale Grocers Ass'n, 181 Fed. 706.

In Pellet v. Sonotone (Cal.) 151 P.2d 912, the court said that:

"In classifying such an agreement, we may, so far as it affects joint tort feasors, look to its consideration, its effect and the circumstances attending its execution. We cannot accept the recitals of the parties to the agreement as a conclusive determination of its character."

In Jenkins v. Southern Pac. Co., 17 F. Supp. 820 (reversal on other grounds in (1938; CAA 9th) 96 F.2d 405, affirmed in (1939) 305 U. S. 534, 83 L. Ed. 334, 59 S.Ct. 347) it was held:

"A mere covenant not to sue, which does not contain words amounting to a release of the cause of action, or which negatives such release, is not effective for the purpose of releasing other joint tort feasors *** (citing cases).

The question, therefore, in this as in every case, is whether the particular instrument was one of release, or merely a covenant not to sue."

The court reviewed many cases on the subject, analyzed in detail the instrument concerned, in that case, then as to the construction of the instrument, held:

"An instrument must be given the effect it bears on its face. It is true (as was the case***) that when an instrument states specifically that it is a covenant not to sue, the court cannot interpret it in any other way, *and read into it words of release.* But the converse is also true, that is, if the instrument shows on its face that it is, in truth, a release of a particular claim, and the claim is identified, it amounts to a general release of the cause of action, although the word 'release' is not actually used. Here three other verbs are used which, actually, achieve a release, to-wit, *refrain from instituting, pressing or in any way aiding.* And this release is intended to affect any other cause of action which may exist from the beginning of the world until the present time.

It is evident that when this is the result aimed at, the mere fact that the parties entitle an in-

strument of settlement a 'covenant not to sue' means nothing. The instrument must be given the effect it bears ***.

To give such instrument, under such circumstances, the effect of a mere covenant not to sue would be allowing form to take the place of substance, and words the place of acts."

It is to be noticed in the case at bar that there was no attempt to reserve any right in the settlement of the case against the Railroad Company, neither is there any covenant not to sue, but there is a full and complete satisfaction of judgment; a direct and complete release made after judgment rendered.

Thus, Appellee here is in a much stronger position than Eberle v. Sinclair Prarie Oil Co., supra, and Cain v. Quannah Light & Ice Co., supra, wherein the judgments attempted to reserve a right against other tort feasors, and Dawson v. Board of Education, Etc., supra, wherein the satisfaction recited that there was no intention of satisfying or releasing any claim against the other joint tort feasor.

The difference between the case at bar and the authority cited by Appellant was recognized by the 10th Circuit Court of Appeals in Eberle v. Sinclair Oil Co., supra, when it said:

"***The administratrix might have entered into a compromise with McGeorge, dismissed her action against it, released McGeorge or covenant-

ed not to sue McGeorge and reserved her right to sue Sinclair and Gray.

Instead of following that course the administratrix elected to enter into the contract compromising and settling her two single causes of action, received the sum stipulated in satisfaction thereof, and submitted the compromise to the court for its approval. The court by its judgment approved the compromise and settlement and dismissed the action with prejudice. The judgment had the same effect as though it had been entered in favor of the administratrix for the stipulated amount and had then been satisfied upon payment of that amount ***."

Referring then to Appellant's authorities Lovejoy v. Murray, appellant's brief page 8, is a case wherein plaintiff recovered judgment for about $6,000.00 against one joint tort feasor, upon which he received payment of about $800.00. The court said that the issue was: "Is the judgment, or the judgment and part payment in that case, a bar to this action?". The court merely held that the part payment *was not a satisfaction*, but did recognize that a satisfaction of one judgment is a bar to subsequent actions, saying:

"2. That no matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the

plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause."

In Young v. Anderson, Appellant's brief page 9, the parties were not joint tort feasors. The actions were upon separate causes, and the instrument was considered as a covenant not to sue. 33 Idaho at page 524, 196 P. at page 194, the court said:

> "The document is to be construed as a release, having the effect of an agreement not to sue, and not as an acknowledgement of satisfaction for the injuries received. The Boise Valley Traction Company was not in any sense a joint tort feasor with defendant. The release, therefore, was not a bar to the counterclaim against respondent.***"

Although Huskey Refining Co. v. Barnes, page 9 of appellant's brief, held that the payment by one "operates to reduce pro tanto the amount recoverable by the other," that case, like Young v. Anderson, concerned independent tort feasors, and it was not determined whether or not the instrument was a release or a covenant not to sue. At page 716, 119 Fed. 2d, the opinion states:

> "Some time after the accident an instrument denominated a 'covenant not to sue' was executed by Barnes administratrix***.
>
> We think it unnecessary to consider whether the contract is a release; for the purpose of the decision we may assume that it is. But plainly

appellant and the railroad company were not joint tort feasors***.

"Between appellant and the railroad there was no concert of action, common design or duty, joint enterprise, or other relationship such as would make them joint tort feasors. ***where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tort feasor may be held for the entire damage—not because he is responsible for the act of the other, but because his act is regarded in law as a cause of the injury. *** In the case of such independent concerning torts the release of one wrongdoer does not release the other. Young v. Anderson, supra, and cases there cited."

Again, in the Huskey case, it was a partial payment made upon a disputed unliquidated claim not reduced to judgment.

In Friday v. United States, appellant's brief page 10-11, a partial payment had been made without any determination of the full amount of damages. Again, this action concerned independent tort feasors, the instrument expressly reserving a right of action against "any other tort feasor, upon whom and against whom a liability may be predicated by reason of (a) independent negligence of, (b) acts by, or (c) liability on the part of said other tort feasor or tort feasors causing or contributing to the damage," and the court said that:

"It is also apparent that the above release does not purport to be a payment for all the injuries

suffered by ***."

and (emphasis supplied):

> "*** It is as imperative that the tort claimant shall receive full compensation, as it is that the tort feasors shall not pay twice or more than the *full* award, *determined judicially or otherwise*, as a unit or piecemeal."

In the case at bar this award was determined judicially in the action against the Railroad Company.

While the court in the Friday case stated that it was impressed that the dicta in the two Idaho cases (Young v. Anderson and Valles v. Union Pacific Railroad) actually stated the law in Idaho, that statement by the court was made in regard to the particular facts on hand, where only a partial settlement had been made and rights clearly reserved in the nature of a covenant not to sue.

And the court in Garvin v. Osterham, appellant's brief page 12, recognized that a release or a satisfaction given to one joint tort feasor releases all others. The court said:

> "There is no question but what under Oklahoma Law that a judgment on the merits entered and satisfied as to one of several joint tort feasors serves to bar any future action against the remaining tort feasors ***. This rule finds root in the concept that there can be only one recovery for any one wrong and an attempt to prosecute a claim against remaining tort feasor defendants

after judgment and satisfaction as to other joint tort feasors is an attempt to split a cause of action.

However, in the instant cases, the judgments entered by the court dismissing two of the alleged joint tort feasors were not judgments on the merits wherein settlement agreements were approved by the court and incorporated into final judgments in favor of plaintiff, but were judgments sustaining plaintiff's motion to dismiss, without regard to the merits, and which technically amounted to judgments in favor of the dismissed defendants and not the plaintiffs."

We think that appellant's authorities, which are that where a partial settlement is made, and rights reserved under an agreement in the nature of a covenant not to sue, the partial settlement being made as to unliquidated damages prior to judicial determination, are not authority as to the facts in this case.

Likewise, authority cited by appellant for what appellant terms the "full compensation rule," do not support such a statement in relation to the facts at hand. The cases cited by appellant recognize (appellant's brief, page 14) that there must be full satisfaction or

"that which the law must consider as such ***."

Or, as stated in many of the cases, that appellant has received satisfaction "or what in law is deemed the equivalent."

VII

MOTION TO DISMISS

The District Court in the instant case did consider and treat the motion as one in summary judgment, and in that respect Martin v. Broadcase Music, Inc., 248 F.2d 530, does not appear to be in point.

In this case, Judge Taylor, (Tr. 22) in his order, stated that "defendant's Motion will be treated as one for summary judgment," and (Tr. 25) "accordingly, it is ordered that the Motion of defendant be, and the same is hereby granted."

In the judgment (Tr. 25) it is recited that:

> "The above matter coming on before me on Defendant's Motion for Summary Judgment *** it is the determination of this court that the motion for summary judgment is well taken, and the defendant is entitled to a judgment of dismissal."

Respectfully submitted,

CLEMONS, SKILES & GREEN

By_____

A member of the firm
517 Idaho Building
Boise, Idaho
Attorneys for Appellee

Due service and receipt of 3 copies of Appellee brief admitted this ____ day of July, 1959.

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Nos. 16,410 16,411

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Appeal No. 16,410

HARRY A. PURSCHE,

Appellant,

vs.

ATLAS SCRAPER AND ENGINEERING CO., a corporation,

Appellee.

Appeal No. 16,411

ATLAS SCRAPER AND ENGINEERING CO., a corporation,

Appellant,

vs.

HARRY A. PURSCHE,

Appellee.

APPELLEE'S BRIEF FOR THE PARTY HARRY A. PURSCHE.

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APPELLEE'S BRIEF FOR THE PARTY HARRY A. PURSCHE.

Introduction.

This is the second brief filed for the party Harry A. Pursche. The first brief for Pursche (17 pages) was filed for Pursche as Appellant; the present brief is filed for Pursche as Appellee and relates to the points raised by Atlas Scraper and Engineering Co. in its opening brief (208 pages). The "jurisdiction" statement as well as the "Nature of the Controversy," "The Parties," and "The Pleadings," are set forth in the first brief for Pursche as Appellant. The "Abstract of the Cases" as set out on pages 3 and 4 of the Atlas opening brief is accurate, but the remainder of the Atlas brief is devoted to argument.

History of Development of the Pursche Two-Way Plows.

Pursche is a farmer. For many years prior to 1947 he farmed substantial acreages in Southern California raising irrigated truck garden crops on a large scale basis. Such crops require that the land be maintained substantially flat for proper irrigation and this is best accomplished by the use of a "two-way" or "rollover" plow having both right-hand and left-hand plowshares. Such plows throw earth from the furrows in the same direction eliminating dead furrows and gullies which interfere with irrigation [Find. of Fact 5, R. 69]. For many years prior to Pursche's inventions there existed a need in the plowing art of a practical and successful two-way or rollover plow which could be easily controlled by the operator and which would plow deep enough actually to turn the soil and not merely scrape the surface of the ground [Find. of Fact 21, R. 24]. The only large two-way plow commercially available was a Moline Tumblebug plow [R. 1632] with a maximum plowing depth of about 11 inches. In that plow the right-hand and left-hand plowshares were mounted to turn about a transverse axis and rotation was accomplished, after manual tripping of a latch, by drag of plows in the ground while the plow was pulled forward by the tractor and the plowshares "tumbled" end for end.

Pursche set out to devise a two-way plow in which both the lifting and turning operations of the plow carrier could be positively and independently controlled by the tractor operator without leaving the seat of the tractor and without requiring any forward movement of the tractor or plow. Pursche also sought to provide maximum maneuverability by close coupling the plow parts

to reduce the overall length, in order to simplify turn-around operations at the headlands. Pursche also set out to produce a heavy duty two-way plow with a minimum number of parts but with greater strength and rigidity than plows commercially available, capable of relatively deep plowing up to 20 inches [R. 201].

The Pursche invention of the basic '090 patent [R. 1548] succeeded in achieving all of these objects. The invention as defined in the claims of that patent comprises the combination of a longitudinal beam having a crossbeam fixed to its forward end, a plow carrier for right- and left-hand plows mounted to turn on the longitudinal beam, and a power cylinder assembly on the crossbeam acting through a power transmitting connection to revolve the plow carrier in either direction. This combination of parts comprises the core of the '090 invention and from it are derived the attributes of positive independent control of both lifting and turning as well as the short coupled feature for maximum maneuverability [R. 268].

The disclosure of the '090 patent shows a large two-way plow personally constructed by Pursche and completed in April 1947. The plow has four right-hand plowshares and four left-hand plowshares. [Find. of Fact 6, R. 70].

At the time of the trial the plow was still in commercial use and was demonstrated to the Trial Court in a field test. [See photographs Exs. 25-A to 25-I, incl.]

The other four Pursche patents in suit are each based on other plows personally constructed by Pursche and relate to subsequent developments and improvements. The '091 patent is directed to a combination including an im-

proved form of swinging tongue which permits direct application of draft forces directly to the longitudinal beam, thereby reducing the draft force stresses in the remainder of the frame. The '089 patent relates to a combination including an "A" frame mounting for the wheel arm cylinders, thereby providing a direct acting hydraulic power connection between the frame and the wheel arms to form a compact unit and eliminating intermediate parts between the hydraulic cylinder assembly and the respective wheel arms. The '284 patent relates to the basic design feature as specifically applied to tractor mounted plows, thereby producing a close coupling connection to minimize rearward extension of the plow parts and thereby minimize "bucking" of the front end of the tractor. The '786 patent relates to a tractor mounted two-way plow for a tractor having draft links which are lifted under hydraulic power, as well as providing a construction wherein the weight of the two-way plow assembly is effective to assist in turning the plow carrier on the longitudinal beam of the plow frame.

The foregoing history of the development of the Pursche two-way plows is set forth in the Findings of Fact Nos. 5 to 17 and 21 [R. 69-74].

The Pursche-Atlas License Agreement April 3, 1948 to July 13, 1952.

The several two-way plows which had been personally constructed by Pursche and used on his ranches were turned over to Atlas for measurement and study by its engineers [R. 74, 1234]. Pursche spent considerable time in conferences with Atlas' designers [R. 265, 1234] and certain features of the '090, '089 and '091 patents were embodied in an Atlas two-way plow shown in Exhibit 18 [Find. of Fact 28, R. 76].

The Pursche-Atlas license agreement and the activities of the parties pursuant thereto are set forth in Findings 18, 19, 20 and 22-28 [R. 74-76]. Contrary to the statement on page 9 of the Atlas brief, Atlas had never built a two-way plow nor any kind of plow prior to the signing of the license agreement with Pursche [Find. of Fact 18, R. 74]. During the period of the Pursche-Atlas license agreement Atlas paid Pursche in excess of $75,000.00 in royalties [Find. of Fact 18, R. 74].

Prior to termination of the license agreement on July 13, 1952 Atlas held out to the trade and to the purchasing public that the two-way rollover plow which it offered for sale was the development and invention of Pursche [Find. of Fact 84, R. 90]. Pursche went on field trips in sales promotion efforts with the president of Atlas [R. 261, 273-289] and was introduced by him as the inventor of the Atlas plows [R. 1211].

Atlas cancelled the license agreement as permitted in Paragraph XIII thereof [R. 1654] on the ground that "manufacture and sale of devices under this agreement is not profitable," but Atlas continued to manufacture and sell the same devices employing the licensed inventions [R. 75]. Moreover, Atlas continued the manufacture and sale of substantially the same plows after issuance of the patents in suit to Pursche and without payment of royalties. The first group of these patents issued on January 13, 1953, six months after the effective date of the cancellation of the license agreement.

The Inventions of the Pursche Patents in Suit.

"The Pursche Patent No. 2,625,090 in suit overcame the problem in the two-way roll-over plow art in providing a new combination of a frame, a longitudinal beam fixed on the frame and extended rearwardly, a plow carrier mounted to turn on the longitudinal beam and provided with right- and left-hand plows, and a power developing hydraulic cylinder assembly on the frame acting through a power transmitting connection to revolve the plow carrier in either direction, thereby establishing a close coupled assembly in which the functions accomplished are more than the sum of the functions of the separate elements." [Find. of Fact 42, R. 79].

"The elements of the combinations of all claims of Patent No. 2,625,090 with the exception of Claim 1, perform an additional and different function in combination than they perform out of combination, to wit: they provide a close coupling relationship between the frame, plow carrier and hydraulic cylinder assembly which enables the operator to turn the carrier independently of forward motion and independently of the raising and lowering action, and provides quick entry and exit of plows with relation to the land, with the result that the space required at the headlands for turn-around is substantially decreased with relation to prior art devices." [Find. of Fact 44, R. 79].

"The elements of the combinations of Claims 12, 13, 14, 15 and 16 of Patent No. 2,625,089 perform additional and different functions in combination than they perform out of the combination, to wit: they provide a direct acting hydraulic power con-

nection between the frame and the wheel arms to form a compact unit eliminating intermediate parts between the hydraulic cylinder assemblies and their respective wheel arms." [Find. of Fact 42, R. 79].

"The elements of the combinations of Claims 6, 7, 8, 9, 14, 15 and 22 of Patent No. 2,625,091 perform additional and different functions in combination than they perform out of combination, to wit: they provide direct application of draft force directly to the longitudinal beam which supports the plow carrier thereby reducing draft force stresses in the remainder of the frame, and they provide for mounting scraper blades on the plow carrier in advance of the plows so that trash may be cut by the scraper blades and buried by the plows in a single plowing operation and with either right-hand or left-hand plows in operative position." [Find. of Fact 45. R. 80].

"The elements of the combinations of Claims 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14 and 15 of Patent No. 2,633,786 perform additional and different functions in combination than they perform out of the combination, to wit: they provide a hitch mounting for a 'Ford-Ferguson' type tractor with power lift draft links, and provide a construction wherein the weight of the two-way plow assembly is effective to assist in turning the plow carrier on the longitudinal beam of the frame." [Find. of Fact 46, R. 80].

"The elements of the combinations of Claims 3, 8, 10 and 15 of Patent No. 2,659,284 perform additional and different functions in combination than they perform out of combination, to wit: they provide a direct mounting connection for a two-way plow

for support on the rear of a tractor, the support means on the plow being mounted at opposed ends of a cross member of the frame, thereby producing a close coupling connection to minimize rearward extension of the parts of the plow and thereby minimize 'bucking' or undesirable lifting of the front end of the tractor." [Find. of Fact 47, R. 81].

The criteria for determining the presence of invention, as set forth by Judge Learned Hand are:

> "the length of time the art, though needing the invention, went without it; the number of those who sought to meet the need, and the period over which their efforts were spread: how many, if any, came upon it at about the same time, whether before or after: and—perhaps most important of all—the extent to which is superseded what had gone before. *Safety Car Heating & Lighting Co. v. General Electric Co.,* 2 Cir., 1946, 155 F. 2d 937, 939."

Those tests of invention were cited with approval in the Ninth Circuit case of *Pointer v. Six Wheel Corporation,* 177 F. 2d 153, 162 (1949). The same tests for invention were referred to in *Leishman v. General Motors Corp.,* 191 F. 2d 522, 531, 9th Cir. (1951).

In the decision of the District Court in the present Pursche case, as stated orally from the bench at the close of the trial, the trial Judge indicated that he was adopting these tests for invention:

> "I have in mind the statement of this circuit in the Leishman case which was cited this morning, in 191 F. 2d, that the court takes into consideration four things." [R. 1292].

The Court continued:

"The first is the length of time that the art went though needing the invention and the length of time it went without it. Certainly the length of time that a rollover plow, a successful rollover plow which was operable and which could be easily operated and which would not only plow shallow and merely scrape the surface of the ground, such as a cultivator or a harrow, but would actually turn the soil, was needed and it has been needed in the art for a long time.

A second element is the number of those who sought to meet the need and the period over which their efforts were spread. The prior art patents here showed that people attempted in the American scene (and disregarding the foreign patents), that people were attempting to meet this need as long ago as 1871. Certainly not the Capon nor the Unterilp patents, which are crude, and in my judgment, neither of them would work—I think the Unterilp patent if it were built and put in the ground would break to pieces; I do not think it would hold together at all —so it could not have been a new and useful thing, and it did not anticipate the combination that is here.

I merely cite those to show how long other people had been at it.

The third element is how many others came upon the same idea and about the same time. Well, people were getting close to the idea when they got the Lindeman plow and when they got some of the Ferguson plows. But neither the Lindeman plow nor the Ferguson plow, in my judgment, anticipated the plow which Mr. Pursche invented here.

> The fourth element, and described as the most important of all, is the extent to which it superseded what had gone before, I think the evidence is pretty plain, in this case that the basic and general methods which were devolved by Mr. Pursche here, whether they are infringed or not is another question, but the basic and general method has certainly superseded the prior art in plows."

With regard to the first and second elements in the above-noted test, the party Atlas set up some ninety-odd prior patents and prior publications to show anticipation of the Pursche inventions [R. 77] but the District Court held that

> "This large number of patents and publications serves only to emphasize the importance of the inventions made by the party Harry A. Pursche and covered by the patents in suit." [Find. of Fact 34, R. 77].

As set forth in *Reynolds et al. v. Whitin Mach. Works,* 167 F. 2d 78 (C. C. A. 4 1948), at page 83

> "Defendant has cited 21 patents as basis for its contention that complainants' invention is lacking in novelty; and this in itself is evidence of the weakness of the contention. Such a citation of so many prior patents almost always means either that none of them is in point and that the patentee has brought together for the purpose of his invention devices to be found in prior patents of different character, or that there have been prior attempts to solve the problem with which he was confronted which have not met with success (citing cases). Patents for useful inventions ought not be invalidated and held

for naught because of such excursions into the boneyard of failures and abandoned experiments."

The evidence that the two-way plows embodying the Pursche invention have superseded the prior art includes the fact that one of the world's largest builders of agricultural machinery, International Harvester Company, took a license under the Pursche patents and abandoned its own efforts to develop a successful two-way rollover plow, and now markets a line of two-way plows for which it pays royalties to Pursche under the same patents involved in this litigation. At the time of the trial, Pursche had received in excess of $35,000.00 in royalties from International Harvester Company. [Find. of Fact 53, 54, 55, 56. R. 82, 83]. While there is no evidence that the Capon plow [R. 1399] or the Unterilp plow [R. 1494] were ever constructed, the evidence does show that the Jumbo plow [R. 1540] shown in the Kaltoft patent [R. 1338] was abandoned and is no longer under production [R. 673], and that the Lindeman plow [R. 1636] likewise has become abandoned [R. 660].

The Trial Court also said:

"Taking each one of the plaintiff's patents, I do not think there was any anticipation in any of the prior art which has been shown to this Court. Certainly in the prior art patents, and in the prior art, outside of the patents, all of the elements which were put together by the farmer, Mr. Pursche, to make a successful plow, that is a useful rollover plow—and in my judgment a new one—were known. But he put them together in a combination which was, in my judgment, new and useful." [R. 1292].

The Pursche Patents Meet the Strict Standards of Invention Required by Ninth Circuit Decisions.

The Ninth Circuit cases of *Harry X. Bergman et al v. Aluminum Lock Shingle Corporation of America,* 251 F. 2d 801 (1957), *Kwikset Locks, Inc. et al. v. Hilgren,* 210 F. 2d 483 (1954), *Talon, Inc. v. Union Slide Fastener, Inc.,* 266 F. 2d 731, *Berkeley Pump Company v. Jacuzzi Bros. Inc.,* 214 F. 2d 785 (1954) and *Oriental Foods v. Chun King Sales,* 244 F. 2d 909 (1957) all held patents invalid on the basis of the stringent requirements set forth by the U. S. Supreme Court in *Great Atlantic and Pacific Tea Co. v. Supermarket Equipment Corp.,* 340 U. S. 147 (1950). Consideration of the subject matter involved in each of these cases, however, shows that only simple and rudimentary improvements were involved and these were of the type that a skilled mechanic might very well have constructed. Indeed, the Turnham patent 2,242,408, invalidated by the Supreme Court in the Supermarket decision, related only to a three-sided open bottom pusher device for sliding merchandise along a counter extension. The harsh language of the decision must be read in the light of the utter simplicity of the subject matter. The Korter patent 2,631,552 involved in the *Bergman* case in the 9th Circuit stands on similar grounds; the only thing new is a drain slot in an aluminum shingle. Similarly, the *Hilgren* case in the 9th Circuit held the Hilgren patent 2,403,597 invalid but the only thing new was the addition of a dead latch to a reverse rocket-type lock, both being old in the prior art. In the *Talon* case, the Silverman patent 2,437,793 was held invalid because the method of attachment of the individual zipper elements, though claimed to be an improvement, did not differ materially

from the prior art, and at best represented only mechanical skill. Also, in the *Berkeley Pump* case the Carpenter patent 2,280,626 was held invalid because it covered only the addition of turbine type impellers to an old style pump. In the *Chun King* case the Paulucci patent 2,679,281 was held invalid as failing to meet the strict standard of the Supermarket case, the improvement constituting joining of two cans end-to-end by means of a tensioned tape wrapped around their adjacent ends. Summarizing, in each of these cases, the subject matter was simple and uncomplicated and only a trifling advance in the art was involved.

The Pursche patent '090 does not show a trifling advance in a very simple device. It shows a two-way plow having in combination a frame, a longitudinal beam fixed on the frame and extending to the rear, a plow carrier mounted to revolve on the longitudinal beam and provided with right-hand and left-hand plows, and a power developing hydraulic cylinder assembly on the frame acting through a power transmitting connection to revolve the plow carrier in either direction, thereby establishing a close coupled assembly in which the functions accomplished are more than the sum of the function of the separate elements [Find. of Fact 42, R. 79]. The elements perform an additional and different function in combination than they perform out of it: they provide a close coupling relationship between the frame, plow carrier and hydraulic cylinder assembly which enables the operator to turn the carrier independently of forward motion and independently of the raising and lowering action and provides quick entry and exit of the plow in relation to the land, with the result that the space required at the headlands for turn around is sub-

stantially decreased with relation to prior art devices. [Find. of Fact 44, R. 79]. Each of the other Pursche patents in suit is directed to combinations in which the elements perform additional and different functions in combination than they perform out of combination [Find. of Fact 42, 45, 46 and 47].

The Pursche patents in suit relate to valid combinations of the type sustained in the Ninth Circuit cases *Stearns v. Tinker & Rasor,* 9th Cir. 220 F. 2d 49 (1955) Cert. denied 350 U. S. 830; *Coleman Company, Inc. v. Holly Manufacturing Company,* 9th Cir. 233 F. 2d 71 (1956) Cert. denied, 352 U. S. 952; *Ry-Lock Company, Ltd. v. Sears Roebuck & Co.,* 9th Cir. 227 F. 2d 615 (1955); *Pointer v. Six Wheel Corp.,* 9th Cir. 177 F. 2d 153 (1944); *Speed Corp. v. Webster,* 9th Cir. 262 F. 2d 482 (1959).

The Stearns invention filled a long felt need in its field and it was specifically pointed out that the elements of the patent "do functionally operate differently in the combination than they did in their old surroundings." In the *Coleman* case the "economizer" as integrated into the device caused all of the elements in combination "to cooperate in a new way to produce a new, useful and unexpected result in the room heating art." In the *Six Wheel* case the addition of a universal joint betwen a rocker arm and a second axle assembly was held to produce a new combination achieving a "particularly unitary result,—a new function." In the *Ry-Lock* case the patent on a tensioning and locking device for a frameless window screen was held valid and infringed. The Court said

> "In our view there is invention here, for the whole of what Ry-Lock has produced exceeds the sum of its parts, and it measures up to the standards of in-

vention which this Court has approved in the Winslow case." (*Winslow Engineering Company v. Smith,* 9th Cir. 223 F. 2d 438).

In the *Speed Corporation* case patent 2,253,990 was held valid and infringed. The patent covered a handle for engaging various tools such as files, screw drivers, etc. The single claim of the patent was directed to a combination of parts having the unique property of adjusting themselves to accomodate tool shanks of various contours.

A study of the Ninth Circuit decisions on patents claiming combinations of old elements to produce new results shows that as the facts vary the application of the law likewise varies. In the present case, the facts demonstrated to the District Court showed that it remained for the farmer Pursche not only to discover and recognize the solution to the problem of providing a heavy duty two-way plow, but also to teach the present day farm implement manufacturers the solution to the problem, among such companies being the oldest manufacturers of farm implements in the United States.

The "last step" doctrine also applies to the Pursche patents in suit. As set forth in the Barbed Wire patent case, 143 U. S. 275 at 282,

> "Under such circumstances courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins. It may be strange that, considering the important results obtained by Kelly in his patent, it did not occur to him to substitute a coiled wire in place of the diamond shape prong, but evidently it did not; and to the man to whom it did ought not to

be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained in favor of the last of a series of inventors, all of whom were groping to attain a certain result, which only the last one of the number seemed able to grasp."

As set forth in the *Sbicca-Del Mac v. Milius Shoe Co.*, 145 F. 2d 389 at 394,

"Under the circumstances present in this case the rule has often proved helpful and has frequently been applied that 'the man who has taken the final step which has turned a failure into success' is entitled to a patent; that 'it is the last step that wins'; and that where a series of inventors are groping to attain a certain result, the last one who grasps the idea which renders the article or method useful and effective is entitled to a patent—that his thought constitutes invention."

As set forth in *Lincoln Stores, Inc. v. Nashua Mfg. Co.*, 157 F. 2d 154 at 163,

"Retrospection is often deceptive and cannot be accorded recognition in the law pertaining to patents. Diamond Rubber Co. v. Consolidated Rubber Tire Co., 1911, 220 U. S. 428, 435, 31 S. Ct. 444, 55 L. Ed. 527. At least Amory provided the final step that proved the difference between success and failure. This is a factor which has been accorded considerable recognition in the courts. The Barbed Wire Patent 1892, 143 U. S. 275, 283, 12 S. Ct. 443, 36 L. Ed. 154; Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co., 1885, 113 U. S. 157, 179, 5 S. Ct. 513, 28 L. Ed. 939."

As set forth in the *Montgomery Ward & Co. v. Clair,* 123 F. 2d 878 at 881, Circuit Court of Appeals, 8th Cir.:

> "The law is that whoever finally perfects and improves a device and renders it capable of practical, useful and effective operation is entitled to a patent although others had the idea and made experiments toward putting it into practice."

Detailed Point-by-Point Answers to Each of the Atlas "Forty-four Points" of Alleged Error.

At the outset it must be noted that Atlas admits infringement of the claims of the patents in suit in accordance with the following schedule:

Patent '090—	Ex. #18	Claims 2-27 inclusive
	Ex. #22	Claims 3, 10, 12, 18, 25, 26, 27
Patent '089—	Ex. #18	Claims 12, 13, 14, 15, 16
Patent '091—	Ex. #18	Claims 6, 7, 8, 9, 14, 15, 22
Patent '284—	Ex. #22	Claims 3, 8, 10, 15
Patent '786—	Ex. #22	Claims 5, 6, 12

Not one of the Atlas forty-four points even alleges non-infringement of the claims in the above table. The only issue of infringement relates to claims 1-4, 7-9, 13-15 of Patent '786. A total of 45 claims are thus admitted to be infringed.

The assertion of Atlas of invalidity of all of the claims are based on many separate defenses. Among these are aggregation, lack of invention, double patenting, failure to distinctly claim the invention, overclaiming and late claiming. Each of these defenses is discussed under the particular one of the Atlas forty-four points where it is raised. The same is true as to the discussion of the count for Unfair Competition, discussed in the Atlas Twenty-Ninth to Thirty-Ninth points.

Atlas First Point: "The District Court erred in failing to hold that claims 2 to 5 inclusive, 10, 12, 14, 17, 18, 19 and 25 to 27 inclusive of the '090 patent are incomplete, do not define an operative structure, and are invalid under 35 U. S. C. Section 112."

All of the claims in issue call for "means on the frame" or "power means on the frame" to turn the carrier. There is no requirement that power means to be defined in each claim as a hydraulic cylinder assembly located in a particular place on the frame. Various aspects of the invention are set forth in Claims 1-5, 10, 14, 17, 18, 19, 25 and 26 and there is no basis whatever for the Atlas contention that each claim must include the particular words: "power developing hydraulic cylinder assembly on the frame acting through a power transmitting connection." None of the claims can be read on the prior art, and each of them defines an inventive structure which was demonstrated in actual field operations to the Trial Judge.

The Ninth Circuit case of *Winslow Engineering Co. v. Smith*, 223 F. 2d 438 is not in point. In that case it was held that the invention resided in a "growth factor" but that none of the claims defined structure which produced it. As distinguished from that situation, "power means on the frame for turning the carrier" is recited in each of the claims in issue.

Atlas Second Point: "Claims specifying less parts than are required for an operative machine are incomplete and therefore invalid."

Atlas relies on *Goodman v. Super Mold Corporation of California,* 103 F. 2d 474 for the proposition that "claims specifying less parts than are required for an

operative machine are incomplete and therefore are invalid." The patent disclosed a tire mold having two rings one on each side of the tire. The claim calling for both rings was held valid and infringed, but a similar claim requiring only one ring was held invalid because it was "incomplete."

The proposition of law stated in the "Second Point" is erroneous. The United States Supreme Court has said,

> "The statutes permit and it is the settled practice of the Patent Office many times sustained by this Court, to allow claims to a combination and also its subcombinations." *Special Equipment Co. v. Coe,* 324 U. S. 370, 377.

Whether the old doctrine applying to the particular facts of *Goodman v. Super Mold Corp. of California,* 103 F. 2d 475 is still good law need not be decided, since the later United States Supreme Court case is clearly controlling.

The *Goodman v. Super Mold* case has not been followed nor cited with approval in any subsequent reported case with relation to the portion quoted.

None of the cases cited in the Atlas Brief support the language of the "Second Point." *Schriber-Schroth Co. v. Cleveland Trust Co., et. al,* 305 U. S. 47, held that the web of a piston originally described as "extremely rigid" could not later by amendment be described as "laterally flexible." In *General Electric v. Wabash Co.,* 304 U. S. 364, a description of an incandescent filament as being "made up mainly of a number of comparatively large grains of such size and contour as to prevent substantial sagging," was held an inadequate definition. In *United Carbon Co. v. Binney Co.,* 317 U. S. 228, claims

were held invalid for lack of distinctiveness. The claims required "substantially pure carbon black in the form of commercial uniform, comparatively small, rounded, smooth aggregates having a spongy or porous interior" or "as an article of manufacture, a pellet of approximately 1/16" diameter and formed of a porous mass of substantially pure carbon black." *Graver Mfg. Co. v. Linde Co.*, 336 U. S. 271, held invalid a group of claims stating that the sole conducting medium for passage of electric current was in the molten welding composition, thereby eliminating any arc. This definition was held to be faulty, because the flux hides from view what actually occurs and it is impossible to say with certainty that there is no arc.

It is apparent that none of these cases is authority for the proposition stated.

It is submitted that the correct rule is set forth in Ellis on Patent Claims, 1949 §141:

> "ELEMENTS INCLUDED IN A CLAIM NEED NOT EXCEED THOSE REQUIRED TO DEFINE THE PARTICULAR INVENTION THAT CLAIM IS DRAWN TO COVER.
>
> * * * * * * * *
>
> "The same rule applies to combination and subcombination claims. Every claim need not include all novel elements in the machine. All that is required is that each claim covers a patentable invention. A complete machine may embody numerous inventions, the number of which depends on how many combinations and permutations of elements, each patentable *per se,* are included in the entire machine. A claim, therefore, need not include elements not essential to the definition of the particular invention that claim is drawn to cover." (Citing *Brammer v. Schroeder,* 106 Fed. 918 (C. C. A. 8).

Atlas Third Point: "Claims 1 to 5 inclusive, 10, 14, 17 to 19 inclusive, 25 and 26 of the '090 patent must be held invalid by this Court because there is no finding of the District Court that the assembly of elements recited in these claims performed an additional and different function in combination, than they perform out of it."

The statement of the "Third Point" is factually inaccurate, and erroneous. Findings 43 and 44 [R. 79] include all of these claims and each claim requires "a power developing hydraulic cylinder assembly on the frame" or an equivalent statement. Thus:

Claims 1, 2, 3:

"means on the frame adapted to turn the carrier."

Claim 4:

"means on the frame for rotating the carrier."

Claim 5:

"power means on the frame adapted to turn the carrier."

Claim 10:

"power means mounted on the cross member operatively connected to the carrier to bring either plow into operative position."

Claim 14:

"means on the frame independent of movement of the plow assembly relative to the ground for turning the carrier relative to the beam."

Claim 17:

"means for turning the carrier to either of two operative positions relative to the frame."

Claim 18:

"means on the frame for turning the carrier to either of two operative positions relative to the the frame."

Claims 19, 25, 26:

"power means on the frame for turning the carrier."

The "Third Point" is thus factually erroneous and merits no further consideration.

Atlas Fourth Point: "The District Court erred in making Findings 43 and 44 and erred in finding that the assembly of elements specified in these two findings established a close coupled assembly performing any new or additional results in combination."

There are not four but thirteen findings relating to the validity of the '090 patent. They are Nos. 35, 36, 37, 38, 43, 44, 50, 51, 52, 53, 54, 55, 56.

Counsel for Atlas refers to the findings of the learned Trial Judge as "hogwash." Perhaps that flagrant impropriety was used to obscure the fact that the cases cited do not support the argument. It is well settled that "a patentee who is the first to make an invention is entitled to his claim for all uses and advantages which belong to it." *Stow v. Chicago,* 104 U. S. 547 (1881). As stated in *Kellogg Switchboard and Supply Co. v. Dean Electric Co., et al.,* C. C. A. 6 (1910), 182 F. 991 at 998. "It is objected that the advantage of avoiding side tones is not mentioned in the specifications. This is true. But this omission was not fatal if the advantage was necessarily achieved through the invention." (Citing cases.)

In *National Hollow Brake Beam Co. et al. v. Interchangeable Brake Beam Co.,* 106 Fed. 693, 709 the Court said

> "When (an inventor) has plainly described and claimed his machine or combination, and has secured a patent for it, he has the right to every use to which his device can be applied, and to every way in which it can be utilized to perform its function, *whether or not he was aware* of all these uses or methods of use when he claimed and secured his monopoly . . ." (Emphasis added.)

To the same effect are the Ninth Circuit cases *Bingham Pump Co., Inc. v. Edwards,* (C. A. 9), 118 F. 2d 338, 340, *Lorraine Corporation v. Union Tank & Pipe Co.* (D. C. S. D., Calif., Central Division), 48 F. 2d 847, 848, Affirmed 48 F. 2d 848, and *Talon, Inc. v. Union Slide Fastener, Inc.,* 266 F. 2d 731, 734 (C. A. 9).

Neither the *Lincoln Engineering* case nor the *Kursheedt* case relied on in support of the "Fourth Point" were decided on the basis of the portions quoted by Atlas. The *Lincoln Engineering* case held that an improvement of one part of an old combination gave no right to claim that improvement in combination with other old parts which perform no new function in the combination. The *Kursheedt* case held that the patent was only of limited scope, and as thus interpreted it was not infringed.

The compactness feature or close-coupled feature discussed at some length in the Atlas brief is not difficult to understand nor hard to find. Figure 11 of the '090 patent shows that the forward plow point lies very close to the cross member 21 of the frame 20 and very close to the hydraulic cylinder 45 mounted on the cross mem-

ber 21. The forward point of the front plow share is placed very closely behind the rear cross member 21 of the frame without interfering with the power means on the frame for turning the carrier 15. This same advantage is shown in the construction of the later filed '089 patent wherein the forward point of the plow share 18 as shown in Figure 2 projects forward of the frame latch 78. This same close coupled connection is shown in Figure 1 of the '786 patent and in Figure 1 of the '284 patent. The construction making this close coupled feature possible is set forth in the claims of the '090 patent, and is present in the accused devices and is not to be found in any of the prior art devices. The prior art devices of Lindeman, Prigden, or Dexheimer do not employ a hydraulic cylinder on the rear cross member of the frame for turning the plow carrier, but all of the accused devices do.

Atlas Fifth Point: "The District Court erred in making Findings 43 and 44 and was manifestly in error in finding any new coaction or new function as the result of mounting a hydraulic cylinder assembly on the plow frame."

In the Capon patent [R. 1399] no means is provided for raising the plows from the ground prior to rotating the carrier. Moreover, the carrier is not rotated by any power means on the frame, or in the absence of forward movement of the entire structure. Forward motion of the ground wheels 25 or 26 is supposed to drive the gears 18 and 19 through sprockets 37 and 32. In the construction of its plows, Atlas has chosen to copy not Capon but Pursche.

Not one of the other eight prior art patents listed on page 73 of the Atlas brief uses a power means on the

frame to turn the carrier in the manner set forth in the claims of the '090 patent. Kaltoft [R. 1338] shows a power cylinder acting through cables 53 and 57 for alternate raising and lowering of the plows 39 and the plows 36 in their individual frames about the horizontal pivots 34, 35. There is no rotating carrier. The same comments apply to the abandoned Jumbo plow [R. 673, 1540]. Briscoe [R. 1382] shows hydraulic cylinders 9 and 19 but neither acts to turn a plow carrier. DeRocher Patent No. 2,113,556 shows a disk plow but the power cylinder 29 does not serve to rotate any plow carrier. Chapman [R. 1303] has a "lifting jack" which is manually operated but it does not turn the plow carrier. Acton [R. 1431] shows power cylinders on a disk harrow for raising and lowering ground wheels. Conley [R. 1334] shows a power cylinder mounted on a plow for raising and lowering ground wheels, but not for rotating any plow carrier. Bunting [R. 1421] has a power cylinder for raising and lowering a plow assembly but not for turning any plow carrier. Atlas has not followed the teachings of any one of these prior art patents but has copied the Pursche construction as set forth in the claims of the '090 patent.

The proposed combinations of prior art patents mentioned by the Atlas expert witness, Fishleigh, are based solely on hindsight. Moreover, when asked for his "best reference" for anticipating the '090 patent he replied that it was Capon *et al.* 2,426,548 [R. 1399] taken with the German patent to Unterilp 49,222 [R. 1494]:

> "Probably, as I say, for the reasons stated I would think Capon was the best" [R. 1042].
>
> "Moreover, when combined or taken into consideration with the Unterilp tail wheel, the Capon struc-

ture with that tail wheel includes all of the mechanical elements that are included in any of the claims." [R. 1041.]

But the Trial Court after hearing all of the testimony and after considering a small model [Ex. HH] of the Capon patent, and both small and full-size scale models of the German patent to Unterilp [Exs. I-I and J-J] found that neither of these patents anticipate any of the claims of the patents in suit. [Finds. of Fact 35, 36, R. 77].

The Atlas brief, page 79, criticizes Finding 44 because "it states that the carrier can be turned independently of raising and lowering action." It is clear from the full context of the Finding that it distinguishes over Lindeman Patent No. 2,543,786 [R. 1438] which can only turn the plow carrier as a function of raising it, just as the Finding distinguishes from the Capon disclosure [R. 1399], by stating that the carrier may be turned independently of forward motion of the plow assembly. Capon discloses no means of lifting the carrier and the only means of turning the carrier is by forward motion of one of the ground wheels.

Findings 43 and 44 are not erroneous and should not be set aside.

Atlas Sixth Point: "The District Court erred in failing to hold claims 1 to 5 inclusive, 10, 12, 14, 17 to 19 inclusive, and 25 to 27 inclusive of the '090 patent invalid on the grounds that they are anticipated by the prior art, lack invention over the prior art, and are aggregational."

Each of the arguments presented in connection with this Sixth Point is based on a proposed combination of

the disclosure of one or more prior art patents with the disclosure of the German patent to Unterilp No. 49,222 [R. 1491]. But the Trial Judge held after watching a demonstration of a full sized model of the device shown in that German patent that

> "The device was crude and would not work" [Find. 37, R. 78].

and further specifically held that the disclosure of that German patent

> "does not anticipate any of the claims of the patents in suit" [R. 77].

Furthermore, nothing set forth under the Sixth Point or anywhere else in the Atlas brief shows that the Trial Judge was "clearly erroneous" in regard to these findings.

Moreover, there is absolutely no teaching in any of the ninety odd prior patents and prior publications set up by Atlas that would lead a man skilled in the plow art to attempt to apply the Unterilp tail wheel to the carrier of any two-way plow.

Atlas Seventh Point: "The District Court erred in failing to hold claims 5, 19, 25 and 26 of the '090 patent invalid on the grounds of anticipation, lack of invention, and aggregation."

The Atlas B-5 plow shown on Exhibit 22 [R. 1668] squarely infringes Claims 25 and 26 of the '090 patent, in spite of the contrary statement contained on page 90 of the Atlas brief. Both right-hand and left-hand plows in the forward gang of the B-5 plow are clearly shown to be carried on supports mounted foward of the thrust collar.

The Capon patent 2,426,548 [R. 1399] was cited by the Patent Office in the file of the '090 patent but was not specifically applied against the claim which issued as Claim 5 of the patent. The reason is perfectly apparent: the Capon disclosure does not include any "power means on the frame for turning the carrier to either of two operative positions." Only the forward motion of the ground wheels is available to turn the gears 18 and 19 for turning the plow carrier. The successful operation of such a device is doubtful in the extreme because no means are provided for raising the carrier before turning it. It is intended that the plow shares be rotated out of the ground by turning the carrier as one of the ground wheels turn. Atlas did not copy the Capon plow. It copied the Pursche plow, first under license and later without any license.

The attempt to discredit claims 5, 19, 25 and 26 on grounds that they relate only to a thrust collar is a weak effort indeed. Admittedly each of the elements of the claimed combination is old.

Atlas Eighth Point: "The District Court erred in failing to hold claims 10 and 12 of the '090 patent invalid over the prior art on the grounds of lack of invention and of aggregation."

The validity of Claims 10 and 12 of the '090 patent is first attacked on the technical grounds that:

1. The tongue is not stated to be horizontally swingable.
2. No means is set forth in the claims for securing the forward end of the tongue against vertical movement.

Neither of these contentions has any merit. Whether the tongue can shift horizontally has nothing to do with the subject matter of these claims. Furthermore, in the normal use of Atlas plows and Pursche plows in which a tongue is provided for connection to the tractor, the tractor prevents upward movement of the forward end of the tongue. When no tongue is provided and the plow assembly is carried directly on the tractor both Atlas and Pursche plows provide lift means connected with the cross member for lifting the entire length of the beam member.

A second attack on the validity of these claims is based on the disclosure of the Capon patent 2,426,548 [R. 1399, 1402]. The Atlas expert witness Fishleigh tried desperately to find in this Capon patent something to support an argument that the longitudinal beam and the carrier could be lifted up away from the ground, in spite of the fact that this is contrary to the method of operation described in the Capon specification. Pursche pointed out that the small unnumbered clip near the lead line from numeral 124 in Figure 8 of the Capon patent is only for the purpose of holding up the tongue, and performs the same function as the pivoted arms "C" in the Prechtel patent 372,235 [R. 1690]. Although the model of the Capon patent was demonstrated to the Trial Judge he held that

> "The disclosure of the Capon patent No. 2,426, 548 [Ex. A-45] does not anticipate any of the claims of the patents in suit" [Find. 35, R. 77].

The third assault on the validity of Claims 10 and 12 is based on the disclosure of Neufang [R. 1324], Lindeman [R. 1438], Briscoe [R. 1382], Prigden [R. 1351] Kaltoft [R. 1338], the abandoned Jumbo plow [R. 1512],

and Dexheimer [R. 1463] but not one of these disclosures shows power means or a hydraulic power cylinder carried on the cross member for turning the carrier to bring either plow into operative position. Furthermore, Dexheimer [R. 1463] is the only one of these references which has a stationary beam member extending longitudinally and lift means that connect with a cross member for lifting the entire length of the beam member. However, Dexheimer does not use power for swinging his 90 degree plow shares into and out of plowing position and there is no suggestion in the prior art of mounting a power cylinder assembly on the same cross member and is used to lift the beam for the purpose of turning the plow carrier.

Atlas Ninth Point: "The District Court erred in failing to hold claim 18 of the '090 patent invalid on the ground of lack of invention over the prior art, and aggregation."

It is argued in the Atlas brief that Claim 18 of the '090 patent reads on several prior art references. Such is not the case. Doane, Matisse and Unterilp do not have symmetrically positioned plows as required, and it is impossible to determine whether Neufang's plows are symmetrically positioned or not, since there is no view in the drawings showing this feature. The Capon patent [R. 1399] does not meet the last element of the claim which requires interengaging means on the carrier and frame. The set screw 63 strikes the laterally shiftable bar 64 for controlling action of the clutches 33 and 38, but it does not contact any part of the frame.

Claim 18 of the '090 patent is also challenged on grounds that the required symmetrical spacing of the plow bodies is not supported by the disclosure. References to

Figure 6 of the drawings, however, shows that the plow points where the plows enter the ground are symmetrically spaced on each side of the longitudinal beam.

Accordingly the arguments challenging validity of Claim 18 are not well founded.

Atlas Tenth Point: "The District Court erred in failing to hold claim 27 of the '090 patent invalid on the ground of lack of invention, aggregation, incompleteness, failing to read on the disclosure of the application as originally filed, and being broader than the alleged invention."

The validity of Claim 27 of the '090 patent is attacked on five different grounds. Considering these in order:

Lack of Invention. Although the prior art patents to Capon, Neufang, Doane, Prigden, Dexheimer and Chapman are listed as performing "the identical function," not one of these patents shows a hydraulic power cylinder assembly mounted on the frame and acting to turn the plow carrier in either direction.

Aggregation. There is nothing whatever aggregative about this claim since each of the elements defined coact with the other elements to produce a unitary result. The close coupled relationship resulting from this combination was specifically found to be inventive in Findings 43 and 44.

Incompleteness. All of the elements required for a complete operative assembly are set forth in this claim. "The statutes permit and it is the settled practice of the Patent Office many times sustained by this Court, to allow claims to a combination and also to a subcombination." *Special Equipment Co. v. Coe,* 324 U. S. 370, 377.

Failing to Read on the Disclosure of the Application as Originally Filed. In the specification as originally filed the means for rotating the carrier were described in the following language:

> "Means are provided on the frame 12 for rotating the carrier 15 from the position shown in Figure 1 to the position shown in Figure 11, and as is shown in the drawing, this means includes a sheave 39 fixed to the forward end of the pipe 16 on the carrier 15 by any suitable means, such as the set screw 40. * * *."

Applicant thus recognized that the flexible cable arrangement was only one means for turning the carrier. Only a preferred form of the invention need be illustrated in the drawings, whereas the claims define the scope of the invention. Of the thirteen original claims filed in the application, all but numbers 5, 12, and 13, later cancelled from the case, required means or power means on the frame for turning the carrier, but not one of them recited a flexible cable. When Patent Claim 27 (Application Claim 32) was added by amendment to the application it was accompanied by the following statement:

> "This claim relates to that feature of the invention wherein a movable power element of a hydraulic cylinder assembly acting in a plane normal to the longitudinal support beam turns a torque receiving element fixed on the forward end of the carrier by means of an intermediate element. The counterparts of the element set forth in this claim are clearly disclosed in the drawings of this application wherein the 'torque-receiving element' is the cable drum 39

and the 'intermediate element' is the cable 41. None of the references appears to be pertinent to this construction."

No new matter was involved. The Patent Office entered the claim without objection.

Page 112 of the Atlas brief cites *Halliburton v. Walker,* 329 U. S. 1 and *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U. S. 47, as authority for the allegation that Claim 27 is either invalid or it must be construed as being limited to the form disclosed in the application. No such conclusion is warranted from either of these cases. The prior art does not show the combination which includes a hydraulic power cylinder assembly mounted on the frame for turning the carrier in either direction. The fact that Claim 27 defines this element of the combination in greater detail does not make the combination invalid nor bring the claim within any rule of invalidity within the *Halliburton* or *Schriber-Schroth* cases.

The late claiming doctrine of the *Muncie Gear* case and the *Western Lithograph* case cited in the Atlas brief is not applicable to the facts here. Broader claims to the same subject matter were presented in the original application of the '090 patent. Thus, original application claim 11 (cancelled before issue) read as follows:

> "In a two-way plow assembly, the combination of a mobile frame, a carrier extending rearwardly from the frame and provided with a right-hand plow and a left-hand plow, means on the frame for turning the carrier about the longitudinal axis to bring either plow into operative position, and interengaging means on the carrier and frame adapted to limit the extent of turning movement of the carrier relative to the frame."

Atlas Eleventh Point: "The District Court erred in failing to hold claim 27 of the '090 patent invalid on the ground of overclaiming."

The alleged novelty in Claim 27 is *not* within the details of element 5 of the claim, contrary to the statement in the Atlas brief. The novelty in this claim resides in the combination of parts acting as defined to produce the results set forth in Findings 43 and 44. The cases of *Lincoln Engineering Co. v. Stewart-Warner Corp.,* 303 U. S. 545, 549; *Bergman v. Aluminum Lock Shingle Corporation of America,* 251 F. 2d 801, 808; *Great Atlantic & Pacific Tea Co. v. Supermarket Corp.,* 340 U. S. 147, 50, and *Willamette-Hyster Co. v. Pacific Car & Foundry Co.,* 122 F. 2d 492, all relate to the situation where the applicant had merely improved one element of a prior art combination and where no change resulted in the combination as a result of this improvement. Not one of the ninety-odd prior art patents and publications cited by Atlas shows a two-way plow having a hydraulic cylinder assembly mounted on the rear cross beam of the frame for turning the plow carrier. The broad combination is new. Claim 27 sets forth this new combination and specifically spells out certain details of the connection between the hydraulic cylinder and the plow carrier. This is clearly permitted under the decisions cited.

Atlas Twelfth Point: "The District Court erred in failing to hold patent '786 invalid on the ground of lack of invention, aggregation, double patenting and that the claims are vague, indefinite and insufficient and do not comply with 35 U. S. C. 112."

Although several grounds of invalidity of the '786 patent are contained in the statement of the "Twelfth

Point", only one of those grounds—Aggregation—is mentioned in the supporting argument. The assembly of plow elements in the '786 patent disclosure is *not* identical to the '090 patent. Quite obviously, the '786 patent shows no supporting wheels on the frame or power cylinders to raise and lower the frame by swinging the wheels or any swinging tongue or mechanism for swinging the tongue, and instead the '786 patent shows a frame particularly constructed for pivotal support on the draft links of a tractor. It is true that a plow of the '786 patent has certain features in common with the other Pursche plows as set forth in Finding 12 [R. 72] but the claims of the '786 patent are not directed to any combination disclosed in any other Pursche patent. Accordingly, the charge of Aggregation is groundless. It is, of course, immaterial how Mr. Pursche learned of the best place to tap into the hydraulic system of the tractor:

> "Patentability shall not be negatived by the manner in which the invention was made." 35 U. S. C. §103.

The claims are directed to a combination of elements producing a new result.

The allegation of non-infringement of Claims 1-4, 7-9, and 13-15 is treated under the "Thirteenth Point", below.

Atlas Thirteenth Point: "The District Court erred in failing to hold that claims 1 to 4, 7 to 9, and 13 to 15 of the '786 patent are not infringed by the B-5 plow."

Claims 1-4, 7-9, 13-15 of the '786 patent relate to pressurizing of the tractor hydraulic system by the weight of the two-way plow assembly whereby such weight assists in turning the carrier on the frame. Contrary to

statements in the Atlas brief, the claims are not limited to a Ford-Ferguson tractor. The claims relate to a particular two-way plow construction for use with the type of tractor having draft links liftable under hydraulic power, and wherein the hydraulic pressure for operating the carrier roll-over cylinder is obtained from the tractor hydraulic lift system. The Atlas brief does not deny that the B-5 plow of Exhibit 22 when mounted on an Oliver tractor with draft links liftable under hydraulic power [R. 1668] constitutes an infringement of these claims. Instead an attempt is made to quote the testimony of Pursche to show some different manner of operation. A complete reading of the Pursche testimony [R. 272] shows that there is no support for such argument.

The hydraulic hose connections to opposite ends of the roll-over cylinder are shown in Section A-A of the drawing B-5 contained in the Pre-trial stipulation Exhibit 7, and the same hydraulic hoses are shown in the photographs of Exhibits 12, 16 and 82. The trial Judge witnessed the field demonstration of the Atlas B-5 plow of Exhibits 22, UU-1, UU-2, UU-3, UU-4 and found that it infringed the claims of the '786 patent. His ruling has not been shown to be "clearly erroneous".

Atlas Fourteenth Point: "The District Court erred in failing to hold the claims of the '786 patent invalid for failure to meet the requirements of 35 U. S. C. 112."

Claim 4 of the '786 patent is charged by Atlas to be "vague, indefinite and functional". The introductory clause recited the environment and reads as follows:

> "4. In a two-way plow assembly adapted for operation with a tractor provided with a pair of draft

> links and a control link, a tractor also having a hydraulic system controlled by the control link for lifting the draft links upwardly, the improvement comprising:"

This background or environment is stated in general terms as it should be. *Refrigeration Engineering, Inc. v. York Corporation,* 168 F. 2d 896, 901, Ninth Circuit (1948).

The criticism of the requirement "hydraulic means for turning the carrier" on the grounds that the hydraulic cylinder does not act directly on the carrier but through the intermediate member, the cable, is not a valid criticism. Part of the "means" is hydraulic and that is sufficient.

The criticism of the last element of the claim is likewise unwarranted. The first two words of the element "and means" are not to be ignored. The claim recites sufficient structure to support the functional statement at the end, and this is all that is required. 35 U. S. C. §112. The contention made by Atlas under the "Fourteenth Point" would have merit only if the last element of the claim read as follows:

> "and means whereby pressure imposed on the hydraulic system by weight of the plow assembly and ground wheel in elevated position acts to energize the hydraulic means of the plow assembly."

When the structure is supplied so that the "means" includes "a conduit connecting the hydraulic system on said tractor with the latter said hydraulic means" the arguments simply do not apply.

Atlas Fifteenth Point: "The District Court erred in failing to hold that the claims of the '786 patent are invalid over the plow of the '090 patent."

Atlas argues that Claims 1-4, 7-9 and 13-15 of '786 patent are invalid because the patent was filed more than year after the demonstration by Pursche of the plow of the '090 patent, but in fact not one of these claims can be read upon the disclosure of the '090 patent or upon the '090 type plow. The preamble or environment relating to the draft links and control links on the tractor are of course, lacking. Moreover, the frame of the '090 plow was not pivotally connected to the draft links and control link and adapted to be raised and lowered thereby. The '090 plow certainly did not include

> "means including a conduit connecting a hydraulic system on said tractor with the latter said hydraulic means whereby pressure imposed on the hydraulic system by weight of the plow assembly and ground wheels in elevated position acts to energize the hydraulic means of the plow assembly."

Certainly there is nothing but hindsight to guide a skilled mechanic to change the shape of the frame of the '090 plow to correspond to Ferguson or Lindeman or Dexheimer in order to mount such a frame on the tractor. None of the prior art patents mentioned has hydraulic means for turning the carrier on the frame to bring either plow into operative position.

Whatever Bunting and Brimhall did with the hydraulic connections, it is clear that they did not use the hydraulic power supplied by the tractor hydraulic system to roll a plow carrier of a two-way plow.

Atlas Sixteenth Point: "The District Court erred in failing to hold that the claims of the '786 patent are invalid in view of Dexheimer, Ex. A-60, taken in connection with Kaltoft, Ex. A-54, or the Jumbo Plow, Exs. AD-1 to 3 and AU-1 to AU-8."

The Kaltoft patent [R. 1338] and the abandoned Jumbo plow [R. 1512, R. 1540] both show all of the right-hand plows mounted on one lift frame and all of the left-hand plows mounted on another lift frame. Both lift frames pivot about an axis extending transversely of the plow. A hydraulic power cylinder operates through cables to lift one or the other of the frames. There is no carrier, no longitudinal beam and nothing to roll the carrier. Atlas suggests that this disclosure be combined with that of Dexheimer [R. 1463] to anticipate the claims 1-4, 7-9 and 13-15 of the '786 patent. There is no suggestion anywhere in the prior art for making such substitution and reconstruction of parts and this amounts only to a flagrant example of hindsight.

Atlas Seventeenth Point: "The District Court erred in failing to hold claims 5, 6 and 12 of the '786 patent invalid as lacking invention over the prior art, and as aggregational."

It is true that Claims 5, 6 and 12 of the '786 patent do not require any connection to the hydraulic system of the tractor in order that the weight of the plow be effective to assist in turning the plow carrier. However, these claims do *not* read upon the disclosure of the '090 patent or upon the '090 type plow. Considering Claim 5, for example, neither the '090 patent nor the '090 plow is "adapted for use with a tractor having draft links liftable under power and having an auxiliary link". Moreover neither has "an upstanding post fixed on the

frame". Also, neither shows "pivot means for connecting the draft links to the ends of the cross bar and for connecting the post to the auxiliary link". Contrary to the statement in the Atlas brief it appears unlikely in the extreme that a "skilled mechanic could take the plow of Lindeman or Dexheimer or Pridgen and mount on it the rollover plow arrangement disclosed in the '090 patent." This proposed reconstruction is certainly based only on hindsight.

The Atlas brief states:

> "Lindeman is probably superior to '786 structure since it eliminates one of the hydraulic cylinders * * *".

It should be noted, however, that Atlas chose to copy not Lindeman but Pursche.

Atlas Eighteenth Point: "The District Court erred in failing to hold the '786 patent invalid and void on the ground of double patenting."

It is true that Claims 1, 3, 10, 12, 18 and 25 to 27 of the '090 patent read on the disclosure of the '786 patent. It is noted that Atlas in its brief admits that these same claims read on the Atlas B-5 plow of Exhibit 22. But none of the claims of the '786 patent read on the '090 patent. The '090 patent does not show "a two-way plow assembly adapted for use with a tractor having draft links liftable under power" and it does not show "pivot means for connecting the draft links to the ends of the cross bar". The following far fetched argument and strained interpretation appears on page 135 of the Atlas brief:

> "In the '090 patent, the cross bar 21 is connected to the tractor through the other members of the

> frame and the tongue and the short link 88 at the forward end thereof as shown in Figure 8. The ring 91 or the horizontal pin 89 may be considered as a pivot means for connecting the plow to the tractor. Since the tongue is connected to the frame and since the side members of the frame are connected to the cross beam, there is a pivot means which connects a draft link to the ends of the cross bar."

The argument quoted is ridiculous and clearly fails to meet the claim requirement:

> "pivot means for connecting the draft links to the ends of the cross bar"

as that requirement is to be interpreted by the drawings and specification of the '786 patent.

All of the cases cited under the "Eighteenth Point" and relating to double patenting are clearly not in point because there is no claim in the '786 patent which can be read on the disclosure of the '090 patent.

Atlas Nineteenth Point: "The District Court erred in failing to hold the claims invalid as lacking invention over the plow of the '090 patent."

It is clear from the context of the Atlas brief that the "Nineteenth Point" refers to claims of the '284 patent. This '284 patent was filed July 12, 1948, prior to the filing date of the '786 patent on August 14, 1948. Accordingly, the broad claims on the tractor mounted two-way plow are contained in the '284 patent, and not in the '786 patent. Claims 3, 8, 10 and 15 of the '284 patent were found to be infringed by the Atlas B-5 plow of

Exhibit 22 [Find. 33, R. 77].* Claim 10 is typical and is set forth below:

> "10. In a two-way plow assembly adapted to be carried by a tractor, the combination of: a longitudinal beam extending in the direction of normal travel of the plow assembly, a cross-beam fixed to and intersecting the forward end of the longitudinal beam, a thrust-absorbing element removably mounted on the rearward end of the longitudinal beam, a carrier turnably mounted on the longitudinal beam between the cross-beam and the thrust-absorbing element, the carrier being provided with a right-hand plow and a left-hand plow angularly spaced substantially one-half revolution apart, power means including a double-acting hydraulic cylinder assembly on the cross-beam operatively connected to turn the carrier through substantially one-half revolution in either direction on the longitudinal beam to bring either plow into operative position, stop means on the cross-beam to limit turning movement of the carrier in either direction, and support means at the opposed ends of said cross-beam adapted to be carried by the tractor."

This claim, as well as Claims 3, 8 and 15, cannot be read upon the disclosure of the '090 patent.

Atlas Twentieth Point: "The District Court erred in failing to hold the '284 patent invalid on the ground of double patenting."

The validity of the '284 patent is challenged on grounds of double patenting with respect to the '090 patent and

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*And indeed it was conceded [Trial Court Tr. p. 2699].

with respect to the '786 patent. The '090 patent was filed July 14, 1947. The '284 patent was filed July 12, 1948, and the '786 patent was filed August 14, 1948. The charge of double patenting with respect to the '284 patent fails because the claimed subject matter of the '284 patent distinguishes in a patentable sense from the claimed subject matter of the '090 patent. It is immaterial whether the broad claims of the early '090 patent can be read on the disclosure of the '284 patent. It is likewise immaterial to the validity of the '284 patent whether the claims of the later filed '786 patent can be read on the disclosure of the '284 patent. The double patenting problem does not arise merely because claims of the '090 patent dominate disclosures of the later patents, nor because claims of the '284 patent dominate the disclosure of the later filed '786 patent. In each case, the broad claims appear in the earliest filed application.

Even if it were true, and it is not, that Appendix E of the Atlas Brief shows that Claim 6 of the '786 patent reads on the disclosure of the '284 patent, this would be immaterial on the question of validity of the earlier filed '284 patent. Claim 6 of the '786 patent fails to read on the disclosure of the '284 patent because the latter lacks "pivot means for connecting the draft links to the ends of the cross bar". The pivot bolts 18 of the '284 patent do not connect the draft links or anything else to the ends of the cross beam 13. Appendix F correctly shows that Claim 15 of the '284 patent dominates the construction shown in the later filed '786 patent. This only means that the earlier filed patent contains the broad dominating claims, and the allegation of double patenting fails.

With regard to the charge of double patenting of the '284 patent with respect to the '090 patent, it is im-

material that claims of the '090 patent dominate the disclosure of the '284 patent. The broad dominating claims are in the earlier filed patent. However, Claim 3 of the '284 patent does not read on the disclosure of the '090 patent, because the '090 plow is supported on its own wheels and not on a tractor, and because the '090 plow does not have support means at the opposed ends of the cross member adapted to be carried by the tractor. Claims 8, 10 and 15 of the '284 patent distinguish over the '090 patent disclosure for the same reason.

Atlas Twenty-First Point: "The District Court erred in failing to hold the claims of the '089, '090 and '091 patents found to be infringed by Exhibit 18 invalid for failing to comply with 35 U. S. C. 112."

Atlas argues that all of the claims of the '089, '090 and '091 patents are invalid for overclaiming and for failing to particularly point out and distinctly claim the invention. To support this argument with respect to the '090 patent Atlas argues that Claim 6 is unpatentable over the prior art because each of the individual elements of the claim can be found in prior art patents. Certainly this is not the test. Each of the elements of the combination is assumed to be old and was so found by the trial court [Find. 41, R. 78]. Atlas argues that Claim 6 of the '090 patent is invalid under 35 U. S. C. §112 because Capon [R. 1399], Melotte, Exhibit A-66, Melotte [R. 1469], and Weyhmuller [R. 1495] show certain of the elements of the claim. For convenience, the claim is set forth below:

> "6. In a two-way plow assembly, the combination of a frame, a tongue pivotally connected to the frame for relative lateral movement, a carrier mounted on the frame and provided with a right hand plow and

a left hand plow, *first power means on the frame for moving the carrier to bring either plow into operative position, second power means on the frame for shifting the tongue, and stationary power transmitting elements interconnecting said first and second power means for conjoint operation, whereby the tongue is shifted in response to movement of the carrier.*"

Not one of the references shows the subject matter contained in the italicized portion of the claim. Not one of them has the first power means on the frame for turning the carrier, the second power means on the frame for shifting the tongue, or the stationary elements which interconnect the two power means for conjoint operation.

The same objection is applied by Atlas to Claim 7 of the '091 patent. It likewise fails because the claimed combination is not present in the prior art. The '090 patent is not prior art as against the '091 patent since both issued on the same day.

Claim 12 of the '089 patent is also challenged. This claim includes the following requirements:

> "arms pivotally mounted on the frame; means connecting the extending end of each arm to one of said supporting wheels; upright standards on the frame; pivot means on each arm intermediate the ends thereof; and upright power cylinder assemblies each operatively interposed between the pivot means on one of said arms and the upper portion of one of said standards for pivoting the upper arms relative to the frame."

While this quoted portion of the Claim 12 is admittedly only a part of the combination claimed, the recitation in

the balance of the claim of the frame, supporting wheels, carrier, etc. is necessary to relate the parts which co-operate in the new combination.

The portions of the comments of the Trial Judge quoted by Atlas and torn from context are misleading. For example, just prior to the first quoted portion on page 2476 of the trial transcript, the Trial Judge said

> "I think he had invention, I think that he got a combination here of all of these things that people had been trying to get—I do not think the Capon patent disclosed it. I don't think Unterilp disclosed it; everything disclosed a little bit, but he put them all together in a workable plow that a farmer could make, and did make, and go out and plow ground with it. And that is what they were after, and that is what he got."

Atlas Twenty-Second Point: "The District Court erred in failing to hold claims 6 to 9, 11, 13, 15, 16, and 20 to 24 of the '090 patent found to be infringed by Exhibit 18, invalid on the grounds of lack of invention, and aggregation."

Atlas first challenges the validity of Claims 6-9 and 20-23 of the '090 patent and selects Claim 6 as being typical. Claim 6 is set forth in full under the discussion relating to the "Twenty-First Point" *Supra.* Atlas argues that the various elements of Claim 6 are found in Melotte [R. 1469], Melotte [A-66], Weyhmuller [R. 1495], defendant's Exhibit B-9-a, York [R. 1328], Briscoe [R. 1382], Acton, [A-43-a], Wilson, [R. 1362], Capon [R. 1399], Chapman [R. 1299]. Of course, not one of these prior art references in itself provides a complete anticipation of Claim 6; otherwise Atlas would not have found

it necessary to list the other nine references. Moreover, not one of these references shows a two-way plow having power means on the frame for moving the carrier to bring either plow into operative position. Not one of these references shows a two-way plow having power means on the frame for shifting a tongue. And nowhere in this collection of references is found a two-way plow having these two power means interconnected.

Weyhmuller [R. 1495] is quoted as anticipating the interconnection feature but the quoted portion of this foreign patent comprises only a statement of what the prior art was believed to be at that time without showing such prior art in the drawings. Such a statement is not part of the disclosure of the foreign patent and it can have no anticipating effect.

> "A foreign patent is to be measured as anticipatory, not by what might have been made out of it, but by what is clearly and definitely expressed in it. An American patent is not anticipated by a prior foreign patent, unless the latter exhibits the invention in such full, clear and exact terms as to enable any person skilled in the art to practice it without the necessity of making experiments." *Carson v. American Smelting & Refining Co.,* 4 F. 2d 463, 465, 9th Circuit (1925).

Moreover, the language quoted from Weyhmuller would be satisfied by a device of the type shown in defendant's Exhibit B-9a wherein a transversely rotatable carrier was turned by forward motion of the plow frame and drag of the plows in the ground on manual release of a catch. No power cylinder was involved for rolling the carrier or for shifting the tongue.

The Chapman patent [R. 1299] shows how far afield Atlas has gone in trying to anticipate the claims of the Pursche patents in suit. Not even Atlas would allege it was following the teachings of this Chapman patent. The truth is, of course, that Atlas built the Pursche plows under license then cancelled the license and stopped paying royalties, and continued to make the same plows.

Several misstatements of fact appear in the Atlas brief under the "Twenty-Second Point". Capon [R. 1399] does *not* have a lift means for the frame. Claim 16 is not the same as Claim 24; the tail wheel of Claim 16 is required to roll on unplowed ground for both positions of the carrier, whereas Claim 24 would dominate a construction using two tail wheels on one assembly, one being used with the right-hand plows and the other being used with the left-hand plow. Such latter construction is used by Pursche's non-exclusive licensee, International Harvester Company, in the '210 plow, Exhibit 31.

Claims 11 and 13 are challenged on grounds they do not read on the drawings of the patent. The "cross-member" defined by these claims is shown at 21 in Figures 2, 11 and 12 of the patent drawings. The hydraulic power cylinder 45 is mounted on the cross-member 21. The "lift means" includes the mechanism for raising the frame on the wheels and includes the side members 19 and 20 (Figure 11). These side members are connected to the ends of the cross member 21. The claims thus read squarely on the drawings.

Claim 15 has been challenged as invalid over Chapman [R. 1299] or Melotte [R. 1469] and taken in view of Unterilp [R. 1494], but not one of these references shows "a tail wheel on the carrier adapted to roll on unplowed ground *adjacent said vertical standard.*" The purpose of

positioning the tail wheel adjacent the vertical standard is to provide support for the bank on which the tail wheel rolls. See discussion under "Twenty-Third Point".

All of the claims mentioned by Atlas under the "Twenty-Second Point" are charged to be invalid on the ground of aggregation, but no supporting argument is given. All of those claims except 13 are challenged on the ground of old combination. As set forth above, Weyhmuller [R. 1495] does not teach interconnection of a tongue shifting power cylinder and a carrier rollover power cylinder, and the old patent to Chapman [R. 1299] is substantially useless to show any combination set forth in these claims.

Atlas Twenty-Third Point: "The District Court erred in failing to hold the '091 patent invalid for double patenting under the '090 patent."

The '091 patent issued on the same day as the '090 patent. By the weight of authority, the doctrine of double patenting does not apply.

> "Where both patents issue on the same day double patenting does not arise, according to the weight of authority", Amdur, Patent Office Rules and Practice, 1949, Section 79(e), citing *Deister Concentrator Co. v. Deister Mach. Co.,* 263 Fed. 706, C. C. A. 7, (1920).

In that case plaintiff sued on two patents relating to ore concentrating machinery. Both patents issued on the same day. Defendant argued that the later filed patent was invalid for double patenting and cited *Miller v. Eagle Lock Co.,* 151 U. S. 186. The Court said however,

> "But there has been no double patenting in the present case. The two applications were copending.

* * * *The two patents were issued on the same day.*" (Emphasis added.)

A long line of decisions follows the position taken in the *Deister Concentrator* case. Thus, in *Theroz Co. v. United States Industrial Chemical Co., Inc., et al.,* 14 F. 2d 629 (affirmed 25 F. 2d 387) it was stated, at page 640

> "Since the patentee is the same in both instances, the second Schaub patent is not invalidated by the application for the first. *Deister Concentrator Co. v. Deister Machine Co.* (C. C. A.) 263 F. 710. It is true in the case at bar, as in the case cited, that although the claims in the second patent might have been joined with the claims of the first, no damage to the public resulted from their separate presentation, in *view of their simultaneous issuance,* and it is quite clear that no fraud was practiced or intended by the applicant." (Emphasis added.)

Also in *Standard Brands Inc. v. Federal Yeast Corporation*, 38 F. 2d 329 at 344 D. C. Maryland (1930) the Court cited the *Diester Concentrator* case and held that patents issued on the same day were not void for double patenting.

In *Glen Raven Knitting Mills, Inc. v. Sanson Hosiery Mills, Inc., et al.,* U. S. D. C. N. D. North Carolina (1950) defendant argued that one design patent was invalid over another design patent issued the same day. The court said

> "There is no merit in the contention of double patenting Bley patents, design Nos. 151,732 and 151,733 were issued the same day on applications filed the same day; * * * Companion patents issued

on the same day which expire on the same date, do not prolong the life of either. United States Industrial Chemical Co. v. Theroz Co., 4th Cir. 25 F. 2d 387. *No damage results to the public from the simultaneous issuance of patents.* Deister Concentrator Co. v. Deister Machine Co., 7th Cir. 263 Fed. 706." (Emphasis added.)

In *E. J. Brooks Co. v. Stoffel Seals Corp,* U. S. D. C. S. D. N. Y. (1958), 160 Fed. Supp. 581, 588, it is stated

"In this case there would appear to be no issue of extention of the patent monopoly, or double patenting, since both patents were issued to the common assignee on the same day."

All of the Pursche patents in suit were copending and each patent refers to all of the earlier filed patent applications. In this situation §120 of 35 U. S. C. applies:

"An application for patent for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in an application previously filed in the United States by the same inventor shall have the same effect, as to such invention, as though filed on the date of the prior application, if filed before the patenting or abandonment of or termination of proceedings on the first application or on an application similarly entitled to the benefit of the filing date of the first application and if it contains or is amended to contain a specific reference to the earlier filed application."

Moreover, not one of the claims of the '091 patent can be read upon the disclosure of the earlier filed '090 patent, and no claim in the '091 patent is directed to the

same invention as any claim in the '090 patent. Claim 15 of '091, referred to in the Atlas brief, requires that the tail wheel roll on unplowed ground adjacent the vertical standard which connects landslides of the right hand plow and the left hand plow. The purpose as set forth in the objects of the invention of the '091 patent (Column 1) lines 19-22,

> "the tail wheel being positioned adjacent the standard for the plow runners so that the bank which the tail wheel rolls upon is adequately supported"

and as set forth in Column 4, lines 28-30,

> "in order that the standard and the lower landslide may support the unplowed ground on which the tail wheel rolls."

The '090 patent does not show this feature and there are no claims directed to it. The tail wheel 18 of '090 patent is positioned to the rear of the rearmost vertical standard and hence the ground upon which it rolls is not supported by the vertical standard. Claim 3 of the '090 patent referred to in the Atlas brief has nothing to do with this feature.

Similarly, Claims 7 and 8 of the '091 patent referred to in the Atlas brief both require that the tongue have a direct pivotal connection with the stationary longitudinal beam member. This is provided by the pins 82 fixed to the stationary beam 19 as shown in Figure 8 of the '091 patent. In the '090 patent, on the other hand, the tongue 70 is connected by a pivot pin 73 to the bracket 74 and the channels 22 and 23. This is clearly shown in Figure 8 of the '090 patent. The heavy draft loads carried by the tongue 50 are therefore applied to the housing 74 and to the channel parts 22 and 23 of the frame.

The construction of the '091 patent is superior from the standpoint of applying the heavy draft load directly to the longitudinal beam rather than through other parts of the frame of the machine. Thus, the structure and the advantages to which claims 7 and 8 are directed are totally absent in the disclosure and claims of the '090 patent.

Underwood v. Gerber, 149 U. S. 224, relied upon in the Atlas brief makes no mention of "double patenting" in either the trial court opinion or in the opinion on appeal. The Underwood decision has been followed or cited with approval only in cases involving disclaimers. No such issue is involved in the present litigation.

In the cases of *Miller v. Eagle Manufacturing Co.,* 151 U. S. 186, *McCreary v. Pennsylvania Canal Company,* 141 U. S. 459, *Weatherhead Company, et al., v. Drillmaster Supply Company, et al.,* 227 F. 2d 98, the patents did *not* issue on the same day, and hence these cases are not in point.

Atlas Twenty-Fourth Point: "The District Court erred in failing to find claims 6 to 9 and 14, 15 and 22 of the '091 patent found to be infringed by Exhibit 18 invalid over the prior art."

Since the '090 and '091 patents issued on the same day, they may be treated as a single patent and the required differences between the claims are the same as if they were all in the same patent. Atlas compares Claim 9 of '091 patent with Claim 6 of the '090 patent. However, Claim 9 of the '091 patent requires

> "pivot means connecting the outer ends of the bifurcated portion of the tongue to the frame, a roller on the tongue adapted to roll on the arcuate front member,"

There is nothing in the '090 patent or in Claim 6 thereof relating to such construction. In the '090 patent the front member is not arcuate, the tongue is not pivoted at its bifurcated end, and the tongue does not have a roller contacting the arcuate front member. Claim 6 of '090 is set forth *supra* in remarks concerning the "Twenty-First Point" and is directed to an entirely different combination including

> "stationary power transmitting elements interconnecting said first and second power means for conjoint operation, whereby the tongue is shifted in response to movement of the carrier."

None of the references listed in the Atlas brief teaches the combination set forth in Claims 6-9, 14, 15 and 22 of the '091 patent. The tongue 110 of Orelind [R. 1386] is not bifurcated and does not straddle the arcuate frame member 109.

The Atlas allegation that Claims 6-9 are invalid on Capon, [R. 1399] seems almost incredible.

Claims 6, 7 and 8 require that the tongue be pivoted directly to the longitudinal beam member but Capon's tongue 51 is connected at 50 to cross shaft 49, spaced below the forward end of the beam 1, as shown in Figures 4 and 5 of Capon. Claims 6-9 require an arcuate front member on the frame and power means for swinging the tongue but Capon shows neither of these requirements; the tongue is shifted by the hand lever 56 and the arcuate gear segment 53 is not on the plow frame but on the pivoted draft assembly 52.

The similarity of Claim 14 and Claim 6 in the same '091 patent has no bearing on the validity of either claim. Admittedly they should stand or fall together, but the

validity of Claim 6 or Claim 14 has not been successfully challenged.

Claim 15 of the '091 patent is charged to be invalid "over the prior use of the '090 plow" but that plow was first used in 1947, and the '091 patent was filed in October of 1947. Use within a year prior to the filing date is not a prior public use. Moreover, Claim 4 of the '090 patent is directed to a combination including a "third supporting wheel rolling upon unplowed ground when either plow is in plowing position", while Claim 15 of the '091 patent requires a vertical standard connecting plow landslide positioned so that the tail wheel rolls adjacent thereto. The purpose, as pointed out above, is to provide support for the land on which the tail wheel rolls. These two claims accordingly do not cover the same substance. The Atlas argument certainly goes far afield alleging that Claim 15 is invalid over Chapman [R. 1299] or Chapman [Ex. A-1-b].

Claim 22 is not like Claim 14 because it differs in important and material aspects. It cannot be read on the prior art references set up by Atlas against Claim 6 or Claim 14.

Atlas Twenty-Fifth Point: "The District Court erred in failing to hold claims 6 to 9, 14, 15 and 22 of the '091 patent invalid on the ground of aggregation."

None of the claims of the '091 patent are invalid on the ground of aggregation. As found by the Trial Judge [Find. 45, R. 80].

> "The elements of the combinations of Claims 6, 7, 8, 9, 14, 15 and 22 of Patent No. 2,625,091 perform additional and different functions in combination than they perform out of combination, to wit:

> they provide direct application of draft force directly to the longitudinal beam which supports the plow carrier thereby reducing draft force stresses in the remainder of the frame, and they provide for mounting scraper blades on the plow carrier in advance of the plows so that trash may be cut by the scraper blades and buried by the plows in a single plowing operation and with either right-hand or left-hand plows in operative position."

Atlas Twenty-Sixth Point: "The District Court erred in failing to hold claims 12 to 16 of the '089 patent found to be infringed by Exhibit 18 invalid for double patenting."

Claim 19 of the '089 patent referred to in the Atlas brief (but not charged to be infringed) includes among other things,

> "an actuator element attached to the draft tongue adapted to actuate the latch means"

This actuator element is No. 88 and is clearly shown in Figures 6, 8, 9 and 10 of the '089 patent. A power cylinder 93 acts on this member 88 to shift the tongue 50 as well as to operate the carrier latches 76 and 77. There is nothing in the '091 patent comparable to the cross bar actuator 88 of the '089 patent. The Atlas brief does not even allege that Claims 12 to 16 of the '090 patent are directed to the same invention as the Pursche patent '091. Claims 12 to 16 are directed to the combination including the so-called "A frame" construction, and none of the other Pursche patents disclose or claim such a construction.

Since the '089 and '091 patents issue on the same day, the defense of double patenting does not apply. *Deister*

Concentrator Co. v. Deister Mach. Co., 263 Fed. 706, C. C. A. 7, (1920). See the discussion of the law on double patenting, *supra,* under comments on the Atlas "Twenty-Third Point."

Atlas Twenty-Seventh Point. "The District Court erred in failing to hold claims 12 to 16 of the '089 patent invalid over the prior art."

Contrary to the statement in the Atlas brief, the A-frame construction for raising and lowering a two-way plow frame with respect to its ground wheels is not shown in the Atlas Scraper Wagon [R. 1608]. The A-frame in that device is attached to the scraper bowl which swings up and down between the side bars of the main frame, and the main frame is supported on wheels which cannot be moved up and down relative to it. The A-frame is not on the main frame of the device, but constitutes only an extension of the scraper bowl. Strictly speaking, the A-frame itself is not new but this is true of all of the other elements in the combination claimed. It is certainly not apparent how the A-frame on the scoop bowl of the wagon scraper [R. 1608] could be combined with the Melotte Patent [R. 1469] to anticipate any claims in the '089 patent.

Atlas Twenty-Eight Point: "The District Court erred in failing to hold claims 12 to 16 of the '089 patent invalid on the ground of aggregation."

Claims 12 to 16 of the '089 patent are *not* invalid on the ground of Aggregation or Old Combination. The elements of these claims perform additional and different functions in combination than they form out of the combination, to wit:

> "they provide a direct acting hydraulic power connection between the frame and the wheel arms to

form a compact unit eliminating intermediate parts between the hydraulic cylinder assembly and the respective wheel arms." [Find. 42, R. 79].

Atlas Twenty-Ninth Point: "The District Court erred in finding, concluding and adjudging that it had jurisdiction under 28 U. S. C. A. 1338(b) of the claims for unfair competition."

Atlas Thirtieth Point: "The District Court erred in failing to find and hold that the proof of the claims for patent infringement involved almost nothing that was relevant to any of the alleged claims for unfair competition."

> "The Court has jurisdiction of the claim for Unfair Competition because it is joined with the related claim under the patent statute, United States Code 28, Section 1338(b)." [Concl. of Law XXVIII, R. 95].

The motion by Atlas before trial to dismiss Pursche's cause of action for Unfair Competition for lack of jurisdiction was denied by the trial Court. In the memorandum filed April 24, 1957 the Court said:

> "To hold that the non-federal cause of action of unfair competition must 'rest upon substantially identical facts' (*Landstrom et al. v. Thorpe et al.* (1951, 8th Cir.) 189 F. 2d 46) would narrow and restrict the statute, and in my judgment, is contrary to the plain words of the statute and the obvious intent of Congress. From reading the Complaint and the Answers and the Cross-claim, *much of the proof on one claim would have to be duplicated at another trial on the other claim in another forum;* and where that is

so, the provisions of the statute giving jurisdiction to a 'substantial and related claim' is met." (Italics added.)

The above quoted ruling of the Court was proved to be correct in the course of the trial because much of the proof of the claim for patent infringement was the same as the proof of the claim for unfair competition. Thus, proofs of the following material points related to both claims:

1. The construction and operation of the plows of the plows of the five Pursche patents in suit, including a field demonstration of full size plows. (Witnesses: Harry A. Pursche, Claude B. Ogle, Sr., Roy C. Pursche, Willis L. Miller, Edgar E. Cox, George Ogatta, Leslie I. Phillips, and Clarence T. Fishleigh.)
2. The inventions contained in the patents in suit, as distinguished from the prior art:
   (a) Long felt want.
   (b) Unsuccessful experimentation.
   (c) Commercial success and adoption by the industry.
   (Witnesses: Harry A. Pursche, Claude B. Ogle, Sr., Clarence T. Fishleigh.)
3. The Atlas plow of Exhibit 18, first made under license, combined inventive features from the '089, '090 and '091 patents. (Witnesses: Harry A. Pursche, Claude B. Ogle, Sr., Claude B. Ogle, Jr., Clarence T. Fishleigh.)
4. The Atlas tractor mounted plows B-5 of Exhibit 22 used inventive features of the '090, '786 and

'284 patents. (Witnesses: Harry A. Pursche, Clarence T. Fishleigh.)

5. The question of infringement of the Atlas wheel carriage plows of Exhibits 20, 21 and 23 (Witnesses: Harry A. Pursche, Clarence T. Fishleigh, Claude B. Ogle, Sr., Claude B. Ogle, Jr.)

The five material points listed above are important in the proof of the unfair competition cause of action because they show that the plows which Atlas continued to manufacture and sell after the termination of the license agreement with Pursche embodied the inventions which Pursche disclosed to Atlas. This continued use by Atlas after termination of the agreement of the benefits of the Pursche license, and the continued manufacture and sale of the same plows for which royalty was formerly paid to Pursche forms an important part of the pattern of activity of Atlas which constituted unfair competition.

The test for joining the action for patent infringement with the action for unfair competition as stated by Judge Jertberg in *Falcon Products v. Hollow Rod Sales & Service Co.* (D. C. Cal.) 135 Fed. Supp. 91, requires that the two claims:

> "have a common background of basic facts and that substantially the same evidence will apply to both".

As shown by the five material points in the above list, this test has been met.

The other cases cited in the Atlas brief under the "Twenty-Ninth Point" are as follows:

Dubil v. Rayford Camp & Co., 184 F. 2d 899, method patent and trademark infringement.

Landstrom et al. v. Thorpe et al. (C. A. 8) 189 F. 2d 46. Trademark infringement and unfair competition. (The trial court referred to this case and refused to follow it saying that it "would narrow and restrict the statute".)

Hook v. Hook & Ackerman, Inc., (233 F. 2d 180) Trademark infringement and unfair competition.

Accordingly, the only case cited by Atlas under the "Twenty-Ninth Point" in which unfair competition (without trademark infringement) and patent infringement were involved was *Falcon Products v. Hollow Rod Sales & Service Co., supra.* The test for joinder as set forth in that case by Judge Jertberg is believed to be correct, and the present case meets that test.

Atlas Thirty-First Point: "The District Court erred in failing to find and hold that a failure to assign patents under a licensing agreement does not constitute the tort of unfair competition and is actionable only in contract."

In the Atlas pattern activity which was held to constitute unfair competition, the failure of Atlas to assign to Pursche "inventions, improvements, modifications and betterments" as required by the Pursche-Atlas license agreement was only one item, and that item was coupled with "the attempt to evade this requirement by concealing from and failing to disclose" such matters to Pursche.

[Concl. of Law XXXII, R. 96]. Other items in the Atlas pattern activity and whole manner of doing business were "concealing and failing to disclose" to Pursche development activities as required. [Concl. of Law, XXIX, R. 95], concealing from Pursche the "filing of patent applications in the name of its employee, Roy L. Chandler", [Concl. of Law XXX, R. 96] "the continued use by the party Atlas Scraper and Engineering Co. of developments of Roy L. Chandler so withheld", [Concl. of Law XXXIII, R. 97] the acts of the party Atlas "in filing patent applications in the name of Roy L. Chandler, and Roy L. Chandler and another, on inventions, improvements, modifications or betterments belonging to the party Harry A. Pursche" [Concl. of Law XXXIV, R. 97], all at the sole cost and expense of Atlas [Concl. of Law XXXV, R. 97] and prepared and filed by attorneys for Atlas [Find. of Fact 68, R. 86], the prosecution by Atlas of an interference proceeding in the United States Patent Office against Pursche, [Find. of Fact 65, R. 85] and the finding that Atlas "held out to the trade and to the purchasing public that the rollover plows which were offered for sale under the agreement, Exhibit 7, [B-19], were the development and invention of Harry A. Pursche." [Find. of Fact 84, R. 90].

Under California law as set out in *Seagren v. Smith,* 63 Cal. App. 2d 733, Calif. Dist. Court of Appeal (1944), a licensee who pays royalties under a patent license for manufacture and sale of the patented devices cannot cancel the license and thereafter continue to manufacture and sell the same identical devices. The patent owner licensed a manufacturer to build patented gear pumps on a royalty basis and the parties operated under that agreement for three years. The manufacturer cancelled the li-

cense agreement by notice in writing but continued to make and sell the same gear pumps. On appeal the patent owner was awarded damages corresponding to royalties accruing after cancellation of the license agreement. The Appellate Court said

> "the licensee saw fit to cancel the contract and continued to manufacture and sell the pumps to the detriment of licensor".

The Court held that the manufacturer was liable to the patent owner

> "upon the theory of implied contract based upon the well recognized and settled principal that a person shall not be permitted to enrich himself unjustly at the expense of another".

Summarizing the entire pattern of activity of Atlas, in continuing to accept the advantages and know-how gained during the period that the license was in force and continuing to manufacture and sell the same plows without payment of royalty, and holding out to the public that the plows were developed by Pursche, and in setting up the straw man Chandler in an obvious sham to avoid its obligations to Pursche—these constituted the behavior which the Trial Court found comprises unfair competition.

Atlas Thirty-Second Point: "The District Court erred in holding that Atlas is guilty of unfair competition."

Contrary to the statement by Atlas Findings 81, 82, 83 are fully supported by the evidence, as will appear in the comments below on the "Thirty-Third" to "Thirty-Ninth" points.

With regard to the "unless clearly erroneous" rule, the late Judge Lemmon of this Court said in *Hunter Douglas*

Corporation v. Lando Products, Inc., (9th Cir.) 1956, 235 F. 2d 631,

> "Strong almost to the point of vehemence is the expression 'clearly erroneous'. An appellate court should bear this in mind when it applies Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A. which provides that 'In all actions tried upon the facts without a jury * * * (f)indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'."

Atlas Thirty-Third Point: "The District Court erred in failing to hold there was no violation of Paragraph IX of the License Agreement and no unfair competition with Pursche by failure or refusal of Atlas to assign the chain type tail wheel, Exhibit 42 or the rollover mechanism, Fig. 6 of the patent, Exhibit AR, for the reason that these two structures were conceived after the date of termination of the Pursche-Atlas License Agreement."

The Atlas employee Chandler was named as inventor in four patent applications filed by Atlas, as shown on the chart below:

Date Filed	Exhibit No.	Patent No.	Feature
5/29/52	44	2,817,241	Improved gear type rollover mechanism
2/2/53	51	Ser. No. 334,578 (Since trial date has issued as Pat. #2,842,038)	Butterfly type tail wheel (involved in interference with Pursche)
11/30/53	42	2,773,439	Chain type tail wheel
4/19/54	AR (Fig. 6)	2,830,519	Two-way plow with gear type rollover mechanism

The first three *Chandler* cases listed in the above table were not assigned to Atlas, but were the subject of an exclusive license agreement between Chandler and Atlas, Exhibit 43-a, R. 1683. The first two items in the above table represent work performed by Atlas during the time that the license agreement with Pursche was in force. Thus, Item 1 was filed during the term of the license agreement, and Item 2 was the subject of an interference proceeding between Pursche and Chandler in which Chandler proved construction and operation of his device in February and March of 1952 [R. 1594, 95], during the term of the license agreement. It follows that these first two items represent undeniable violations by Atlas of Paragraph IX of the Pursche-Atlas agreement [R. 1651]. The last item in the above table, Patent 2,830,519, was assigned outright to Atlas, and was not the subject of any license agreement. *The scheme is clear; Atlas took by assignment inventions of its employee except where it would be obligated to assign such inventions back to Pursche under the terms of the Pursche-Atlas license agreement.* The trial judge was therefore certainly justified in concluding that all of the so-called Chandler inventions appearing in the Atlas-Chandler license agreement, [Ex. 43-a, R. 1683] were developed by Atlas during the term of the Pursche-Atlas agreement. The trial court concluded that the actions of Atlas in making a special case of the so-called Chandler inventions to circumvent the provisions of the Pursche-Atlas agreement carried more probative force than the denials of Chandler and Ogle.

The gear type rollover mechanism shown (but not claimed) in the last item listed, the two-way plow of Patent 2,830,519 (Figure 6) is clearly the same mechan-

ism shown in Exhibit 46 developed by Chandler around the middle of 1951 [R. 584].

This was the evidence to support Finding 81, R. 89. Atlas has not shown that the trial court was "clearly erroneous" in making this finding.

Atlas Thirty-Fourth Point: "The District Court erred in finding that Chandler was employed by Atlas as an engineer and designer and in failing to find that he was employed as a draftsman."

While Chandler was employed by Atlas he was named as inventor in the four separate patent applications tabulated under the "Thirty-Third Point" above, which patent applications are all directed to improvements in the main-line "bread and butter" items manufactured and sold by Atlas. He accompanied the first production model of the plow of Exhibit 51 at the demonstration held in Merced, California in March 1952, [R. 1594]. Chandler testified [R. 570] that he made field service calls. Significantly, he testified "I was assigned to the duty along with Bud Ogle, (Claude B. Ogle, Jr.) of designing a new HD and SD plow." In other words, he was given the responsibility along with the son of the president of Atlas, for developing a new line of two-way plows. Chandler also testified [R. 570], "I was assigned the duty in 1953 of making a high clearance grade marker for one of Atlas' customers in Oxnard."

With this evidence before him, the Trial Court was fully justified in finding that Chandler was not a mere draftsman but that he was an engineer and obligated to assign his inventions to his employer which came within the scope of his duties.

Atlas Thirty-Fifth Point: "The District Court erred in failing to find that the inventions of Exhibits 42, 44 and 51 were conceived by Chandler on his own time and not in connection with any assignment by Atlas."

Chandler lived in a house trailer on the Atlas property behind the drafting office [R. 583].

The three patent applications of Exhibit 42, 44, and 51 were filed by Atlas [R. 67] and all costs of filing and prosecution of the patent application were paid by Atlas [R. 67]. Atlas treated the applications as if they were its own. The Atlas attorneys handled the domestic and foreign patent applications and all copies, letters, reports, and bills were sent to Atlas and not to Chandler [R. 601, 608]. At the trial, Chandler didn't know the number of foreign patents filed by Atlas in his name [R. 610]. All of the engineering work in developing the designs and adapting them to commercial use was done by Atlas employees [R. 635]. The actual construction of the devices forming the first reductions to practice was done at the sole cost and expense of Atlas [R. 635]. It seems remarkable, to say the least, that Chandler first conceived each of these ideas relating to his employer's business, either in the Atlas drafting room after hours or in his own house trailer parked adjacent the drafting room. Even if this be true so far as the conception is concerned, the inventions belong to Atlas because they related to the business to which the employee-engineer's duties were assigned, and because the engineering design and construction work in reducing the invention to practice was done at the sole cost and expense of Atlas.

Chandler was a straw man set up by Atlas in a transparent manoeuver to cheat Pursche of his rights under the Pursche-Atlas agreement. On the first Chandler in-

vention developed *after* the termination of the Porsche-Atlas agreement, Exhibit AR, Patent 2,830,519. Chandler assigned his rights to Atlas in the normal fashion, as there was no occasion to continue the subterfuge.

Atlas Thirty-Sixth Point: "The District Court erred in failing to hold that under the facts and law the Chandler inventions of Exhibit 42, Exhibit 44 and Exhibit 51 are his sole and exclusive property."

As stated in *Forberg v. Servel, Inc.,* 88 Fed. Supp. 503, 509, U. S. D. C., S. D. N. Y. (1949),

> "The question whether plaintiff was employed to invent is a question of fact. *E. F. Drew & Co. v. Reinhard,* 2 Cir. 170 F. 2d 679. Here the evidence does not justify a finding that at first plaintiff was so employed * * *. But when * * * his superior, told him * * * to solve a particular problem, he became employed to make an invention, if an invention would solve the problem, even though he had not been so employed originally. *Houghton v. United States,* 4 Cir. 23 F. 2d 386-390, Cert. Denied. 277 U. S. 592, 48 S. Ct. 528, 72 L. Ed. 1004. Having been so employed *his invention became the property of his employer and he was bound to assign it* and any patent obtained thereon, to his employer." (Italics added.)

As stated in *North American Philips Co., Inc. v. Brownshield,* 111 Fed. Supp. 762, 765, D. C. S. D., N. Y. (1953),

> "The defendant was engaged and paid to make specific improvements to the assembly. *He claims that he made the invention at his home at night,* that he was directed by plaintiff to make improvements only to the box part of the assembly

> and not to the loop. However, the reliable evidence, * * * discloses that he * * * did so in the course of his employment at the plaintiff's plant. Under such circumstances, plaintiff is entitled to the invention, if any, and to any patent embodying such invention." (Italics added.)

The plow of Exhibit 51 tested by Atlas at Merced, California in March 1952, [R. 1594] embodied both the butterfly tail wheel invention and the gear type rollover mechanism shown in Figure 6 of Exhibit AR, Patent 2,830,519. Both of these devices constituted projects which Chandler had been assigned by Atlas to work on and develop. They were important jobs relating to improvements in essential parts of the principal products manufactured by Atlas. Chandler could not have worked on these projects unless he had been assigned to work on them.

Atlas Thirty-Seventh Point: "The District Court erred in finding that Atlas filed the applications of Exhibits 42, 44 and 51 in Chandler's name in an attempt to circumvent the requirements of the Pursche-Atlas License Agreement and evade the obligation of assignment of title to Pursche, and in failing to find that Chandler filed the applications in his name because he was the inventor and by law patent applications must be filed in the inventor's name."

Under Paragraph IX of the Pursche-Atlas license agreement [R. 1651] was the requirement

> "Atlas agrees * * * to promptly and fully disclose to Pursche any and all inventions and improvements, modifications and betterments, made, discovered or acquired by Atlas * * * relating to the plow

construction forming the subject matter of this agreement; and any and all such inventions, improvements, modifications and betterments upon the aforesaid plow construction made during the life of this agreement by or through the efforts of Atlas * * * or coming under the control of Atlas * * * shall belong to Pursche whether patentable or not and shall be promptly assigned to Pursche by Atlas * * * ."

The license agreement thus obligated Atlas to *disclose* promptly to Pursche the inventions made by its employee Chandler in the course of his duties. Instead of making such disclosure Atlas filed patent applications on the invention without advising Pursche. The Court held that this was an attempt to circumvent the requirements of the Pursche-Atlas license agreement and to evade this obligation of assignment of title to Pursche. It is true that only the inventor can sign the patent application. Atlas should have made prompt disclosure to Pursche of each of the Chandler inventions. Instead, it took steps to circumvent and to evade the requirements of the license agreement with Pursche. Finding 67, [R. 86] is not erroneous and should not be set aside.

Atlas Thirty-Eighth Point: "The District Court erred in finding that Atlas in failing and refusing to carry out its obligations under the Pursche-Atlas Agreement and assign the Chandler inventions of Exhibits 42, 44 and 51 constitute unfair competition and in failing to find that Atlas never had any right to assign said inventions."

Atlas Thirty-Ninth Point: "The District Court erred in finding that it is unfair competition for Atlas to continue to use, and in adjudging that Atlas cannot without permission of Pursche use the inventions of Exhibits 42, 44 and 51 for the reason that this constitutes an

adjudication of Roy L. Chandler's right without his being a party to this litigation in violation of the 'Due Process of Law' requirement of the Fifth Amendment."

Atlas had the right to compel an assignment to it of the inventions of Exhibits 42, 44 and 51, just as it had the right to compel the assignment of Exhibit AR, Chandler *et al.,* Patent 2,830,519.* Instead Atlas demanded no assignment although it treated the patent applications as if they were its own, and paid for all engineering work and actual construction of the devices. There is no evidence that Atlas ever made a request of Chandler to assign, and it was not until the Pursche-Atlas litigation reached the stage of pre-trial in November 1957 that any written agreement was entered into between Chandler and Atlas. Atlas deliberately avoided taking an assignment from Chandler in order to prevent Pursche from acquiring rights pursuant to the Pursche-Atlas agreement. Atlas having elected to give the inventions to Chandler, instead of demanding assignments so that the inventions could be transferred to Pursche as required by the agreement, now complains that Chandler has been "deprived of property rights under his patents without due process of law." The trial Court did not order Chandler to make any assignments. Chandler was the inventor, but he was not the owner of the patent rights.

By the terms of the Chandler-Atlas agreement, Article IX, [R. 1688] Atlas has the unrestricted right to cancel the license agreement:

> "Atlas shall have the sole right of termination of this agreement, and upon termination of this Agree-

---

*Other Chandler et al. patents *assigned* to Atlas and issued since the beginning of the trial are #2,882,979, filed July 22, 1954, and #2,883,773, filed August 22, 1955.

ment for any reason, there shall be no implied licenses or implied obligations between the parties, and no acts committed by Atlas, its officers or agents prior to the termination of this Agreement, shall be construed as admissions relative to the ownership, rights, validity or scope of Chandler's patent rights."

Atlas need only exercise this right of cancellation in order to return full rights to the inventions to Chandler.

Atlas Fortieth Point: "The District Court erred in failing to hold that Pursche is entitled to no relief because he comes into Court with unclean hands."

Pursche testified [R. 294, 683] that in the latter part of 1948 or the first part of 1949 he made an oral disclosure to Mr. Ogle (Claude B. Ogle, Sr.) of the construction of the butterfly tail wheeel, Exhibit 51, at the Atlas plant. An Atlas salesman told Pursche that Atlas two-way plows in use in the Lancaster area were not able to plow shallow enough. Pursche went to a plow standing at the paint rack and explained to Mr. Ogle how two arms should be added at the thrust collar with an adjusting screw on each arm. The tail wheel would swing from side to side, underneath each of these arms.

Pursche did not file a patent application on the idea until he saw his invention embodied in an Atlas plow some time later. His patent application Serial No. 323,200 became involved in an interference proceeding in the Patent Office, and the other application was the Chandler case, Serial No. 334,578. Although Pursche was the first to file he lost the interference to Chandler because Pursche could not prove that he gave the idea and full description to Mr. Ogle, who denied it. Under the

law, "the date of (that) conception cannot be fully proved by the oral testimony of the conceiver." (Citing cases.) Walker on Patents, Dellers Edition, 1937, page 218. Pursche therefore could not prove conception at the time of his disclosure to Ogle. Moreover, he could not prove reduction to practice because Pursche had not constructed one of the devices prior to filing his patent application. Accordingly, in the preliminary statement filed in the Patent Office in the interference proceedings, Pursche set forth the fact of his disclosure to Ogle [R. 1601] but was unable to offer any proof other than his own testimony. In the circumstances priority of invention was awarded to the junior party, Chandler [R. 1607].

Pursche did not take a false oath. He knew that he was the first inventor and had disclosed the idea to Mr. Claude B. Ogle, Sr. long before the idea was embodied by Atlas in a two-way plow. When he filed his application Pursche had no knowledge and no reason to believe that there would be a rival claimant to the invention.

There is absolutely no basis for any charge of unclean hands against Pursche.

Atlas "Forty-First Point" Through "Forty-Fourth Point".

These four points raised by Atlas all complain of alleged errors of the District Court in admitting and excluding evidence. The brief comments on these points are grouped together here since it is clear that none of them amounts to reversible error.

The Atlas objection to the admission in evidence of Exhibit 72, the written statement of the witness Lundie, is based solely on the ground that it was not proper cross-examination. But Lundie was in court and could readily

have been called under the adverse witness rule and the document Exhibit 72 would have been admissible without question.

The discovery depositions of Harry A. Pursche are contained in two volumes totalling 362 pages. The depositions also include forty Exhibits, many of them constituting multiple page documents or series of photographs. The entire file wrapper and contents of the six different patents originally in suit are among the deposition exhibits and these are the same as Defendant's Exhibits C, D, E, F, G and H in the trial court.

The Trial Judge refused to receive these voluminous discovery depositions into evidence because the witness Harry A. Pursche was before the Court:

> "the witness is here and you can put him on the stand and ask him the same questions word for word if you want to." [R. 702].

The trial Court also said:

> "I still adhere to the view that if a witness is present and available, the witness should and must be used. Otherwise, you wind up by having trials by affidavits." [R. 705].
>
> "Mr. Whann: All right, sir. We will either work out an agreement with Mr. Lyon or we will have to put the witness back on for further examination." [R. 705].

Later, Mr. Whann, counsel for Atlas, called Pursche to the stand and interrogated him about excerpts from his depositions [R. 1106 to R. 1111, R. 1123 to 1128, R. 1132 to 1133].

In view of these circumstances it is clear that the district court did not commit reversible error in excluding the depositions.

A total of forty-six still photographs were taken by a professional photographer in the course of the field demonstration put on by Atlas on March 19, 1958. These photographs were admitted into evidence as Exhibits RR 1-9, SS 1-9, TT 1-7, UU 1-4, VV 1-8, WW 1-9. The fifty foot length of eight millimeter film (25' split lengthwise) has a running time of about four minutes.

The taking of the still photographs by the professional photographer was agreed upon in advance by all parties but there was no advance information or request for permission regarding the use of motion pictures taken sporadically by Claude B. Ogle, Sr. and the witness Fishleigh. The Court said:

> "If there had been something said about taking pictures before and you had called attention to the fact that you wanted to get a picture of this operation, I could have settled it on the spot, whether it could be taken or was appropriate or was not appropriate, or some other operation should be taken. But in my judgment it is too piecemeal to be of any value either to this court or to the appellate court on review." [R. 1009].

At best the motion picture film would be merely cumulative evidence. Clearly the District Court's ruling was not reversible error.

The telegram of the Exhibits 83(a) and 83(b) relate to the sale of model 210 International Harvester plows under its license [R. 1659] with Pursche. These telegrams stand on the same basis as Exhibits AL-1

to AL-12 which are royalty statements from International Harvester to Pursche. All of this material relates to commercial success of the Pursche patents in suit. The effect of the telegram was to bring the file of royalty statements Exhibit AL up to date as of the time of the trial.

Clearly the District Court did not commit reversible error in admitting these telegrams.

Conclusion.

The party Pursche respectfully submits that the District Court did not err in holding claims of the five Pursche patents in suit valid and infringed, and in holding that the District Court had jurisdiction of the claim for unfair competition, and in holding Atlas guilty of unfair competition.

Respectfully submitted,

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Appeal Nos. 16,410, 16,411

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HARRY A. PURSCHE,

Appellant,

vs.

ATLAS SCRAPER AND ENGINEERING CO., a Corporation,

Appellee,

ATLAS SCRAPER AND ENGINEERING CO., a Corporation,

Appellant,

vs.

HARRY A. PURSCHE,

Appellee.

BRIEF FOR THE APPELLEE ATLAS SCRAPER AND ENGINEERING CO.

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Appeal Nos. 16,410, 16,411

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BRIEF FOR THE APPELLEE ATLAS SCRAPER AND ENGINEERING CO.

Introduction.

The party Harry A. Pursche, in his Opening Brief, argues three points:

The Trial Court erred:

(a) In finding that Patent No. 2,625,090 was not infringed by Atlas plows of Exhibits 20, 21 and 23;

(b) In holding claim 1 of Patent 090 to be invalid; and

(c) In failing to award costs to Pursche.

The party Atlas shall answer these three arguments in this same order.

THE TRIAL COURT DID NOT ERR IN HOLDING THE 090 PATENT NOT INFRINGED BY THE ATLAS PLOWS OF EXHIBITS 20, 21 AND 23.

The Trial Court found that the Atlas B-3, B-4, B-6 and B-7 plows disclosed in Exhibits 20, 21 and 23 did not infringe because the plows use a different combination, and stated "the combination is different in that it works differently, particularly with the two wheels riding on unplowed ground and particularly with the eccentric mounting of the plows" [Find. 29, R. 76].

This Finding is a Finding of Fact. The Trial Court attended field demonstrations and saw in operation the plow of the 090 patent shown in Exhibits 25-A, to 25-G (not in Exhibit book), and also the B-3, B-4, B-6 and B-7 plows shown in Exhibits RR-1 to 8, SS-1 to 9, and TT-1 to 6 (not in Exhibit book). From the testimony in this case and from the personal observations, the Trial Court determined that these Atlas plows had a different mode of operation from the plow of the 090 patent.

Pursche Has the Burden of Convincing This Court That Finding 29 Is Clearly Erroneous.

Although recent decisions lean toward the proposition that infringement is a mixed question of law and fact, it is believed that in the present case Finding 29 is one of fact because it finds non-infringement because of a different combination and different mode of operation. In *Kwikset Locks v. Hillgren* (C. A. 9, Feb. 3, 1954), 210 F. 2d 483, this Court said:

> "* * * While it is true that a district court's finding of infringement is generally considered to be a finding of fact that may not be set aside unless clearly erroneous, 'it is (also) well settled that where,

as here, there is no dispute as to the evidentiary facts, and the record and exhibits enable us to clearly comprehend the nature both of the process patented and the alleged infringing process, the question of infringement resolves itself into one of law depending upon a comparison between the two processes and the correct application thereto of the rule of equivalency. * * *" (Pp. 488, 489.)

In September of 1959, in *Moon v. Cabot Shops, Inc.*, 270 F. 2d 539, 545, this Court of Appeals for the Ninth Circuit said:

"The factual finding of the trial court that the accused devices are not equivalent to the patent claims, as so construed, is not to be disturbed unless clearly erroneous. Graver Tank & Mfg. Co. v. Linde Air Products Co., 339 U. S. 605, 610, 70 S. Ct. 854, 94 L. Ed. 1097. We find no clear error in the making of this finding."

Also see *Martin v. Be-Ge Mfg. Co. of Gilroy* (C. A. 9, 1956), 232 F. 2d 530, 532, and authorities cited therein.

Pursche Has Not Shown That Finding 29 Is Clearly Erroneous, and His Argument Is Untenable.

Pursche, on page 10 of his Opening Brief, admits that it is true that such Atlas plows:

"(a) have carriage wheels which always roll upon unplowed ground, and do not alternately roll in the furrow, and

(b) the plow shares are 'eccentric' in their mounting in that they are not symmetrically positioned on both sides of the carrier axis,"

but asserts that these differences are immaterial because they do not affect the patented combinations set forth in the claims. Pursche states "The plows do not 'work differently' but on the contrary work exactly as described in the claims."

The Trial Court held that the new style Atlas plows worked differently and it was on the basis of **different mode of operation** that the Court found the Atlas B-3, B-4, B-6 and B-7 plows did not infringe the 090 patent

The Finding of non-infringement was *not* on the basis that the claims did not read on the Atlas plows. When the Trial Court said that the plows "use a different combination," the Court obviously meant that the elements of the plows and their functions and cooperation were different from those *embodied in* the 090 plow.

The sole basis of Pursche's argument that the Trial Court erred, is that the wording of the claims read on the Atlas plows; and there is no argument nor facts presented to show that the Trial Court was wrong in finding non-infringement because of a different mode of operation.

Infringement Is Not a Mere Matter of Words.

The two leading cases of this Circuit on this point are:

Grant v. Koppl, 99 F. 2d 106, 110;

McRoskey v. Braun Mattress Co., 107 F. 2d 143, 147.

The following language in *Grant v. Koppl* applies on all fours to this case:

> "We note that appellant contends that the claims of the patent in suit read upon appellees' device. We may assume that this is true, especially as to claim 9. But infringement is not a mere matter of words.

(authorities cited) Here, we hold that the mode of operation is different and that there is no equivalency of means. It is not necessary to discuss the claims separately or in detail. * * *" (p. 110.)

In later sections the party Atlas will clearly show the Court the difference in mode of operation and will make a further discussion of the law.

It is of real significance that Pursche does not make a single reference to any testimonial evidence to support his position. In fact, all of the evidence is to the contrary. The testimony of Ogle, Jr. and of the expert witness Fishleigh, clearly establishing that the new style Atlas plows have a different mode of operation, stands unrebutted by any evidence.

The party Pursche has failed to show that the Trial Court was clearly wrong in its Findings.

THE ATLAS B-3, B-4, B-6 AND B-7 PLOWS OF EXHIBITS 20, 21 AND 23 DO NOT INFRINGE THE 090 PATENT BECAUSE OF A DIFFERENT MODE OF OPERATION AND NON-INTERCHANGEABILITY AND NON-EQUIVALENCE OF ELEMENTS.

Although Pursche has utterly failed to make any showing that Finding 29 is clearly erroneous; the party Atlas will show the complete unanimity of the law and facts which conclusively establish that the Finding on non-infringement is supported by substantial evidence, and is correct and should be sustained.

THE FACTS ON WHICH THE TRIAL COURT HELD DIFFERENT MODE OF OPERATION.

The Atlas plows of Exhibits 20, 21 and 23 have a construction and mode of operation of the plows shown in

the Chandler, *et al.* Patent No. 2,830,519 [Ex. AR, R. 1527], which patent for convenience is attached hereto as Appendix 1. The witness Ogle, Jr. described the construction and mode of operation of these non-infringing plows and for this purpose prepared Exhibits AS [R. 1537] AT-1 and AT-2 [R. 1538-1539].

The 519 patent [Ex. AR] may be referred to for a detailed description of these plows, but for the purpose of explaining the structural features pertinent to their different mode of operation and for pointing out the different mode of operation between these Atlas plows and the 090 plow, reference will be made to diagrammatic drawings attached to this Brief as Appendices 2, 3 and 4 which include diagrammatic views resembling views of Exhibits AS and AT-1 and AT-2. Also, in describing these machines, the reference numerals used by the witness Ogle, Jr. in his testimony commencing in the Record on page 1142, will be employed.

As shown in the upper view in Appendix 2, which is illustrative of the B-3, B-4, B-6 and B-7 plows, the numeral 1 represents a tractor which has tracks 2 and 3, which operate on unplowed ground [R. 1150]. A drawbar is connected to the tractor at point 4; the line of draft or line of pull on the plow is indicated by the numeral 5 and this tractor drawbar being freely pivotal always points or extends along this line. The new style Atlas plows have a tongue 29* which is connected to the tractor drawbar at 6. The plow tongue has two diverging rails 7 and 8, one of which always points toward the center of draft of the gang of plows doing the plowing [R. 1151].

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*Numerals added to Exs. AS, AT-1 and AT-2, are written with an underscore, thus "29".

When the plow is in the position indicated by full lines in Exhibit AS, the bar 7 of the tongue lies along the draft line 5 which extends through the center of draft 40. When the plow is plowing in an opposite position, the side rail 8 lies along the dotted draft line 42 which extends through the center of draft 41 [R. 1152].

It will be noted that the line of draft 5 and the dotted line of draft intersect each other at the point 6. The line 18 which is drawn in the direction of travel of the plow passes through this same point and it is along this line that the longitudinal beam 50 of the plow is extended. Also, it is around this longitudinal line or axis 18 that the entire plow carrier 17 rotates [R. 1152].

The tongue, including the side rails 7 and 8, is pivoted at its rear end to a cross-shaft 11 and secured at the opposite ends of the cross-shaft 11 is a right-hand crank 12 and a left-hand crank 13, on which crank or wheel arms, the wheels 14 and 15 are rotatably mounted [R. 1154].

Pivotally connected to the cross-shaft 11 is a frame 16, and connected to the frame 16 is the longitudinal beam 50 on which the carrier 17 is rotatably mounted.

Although it might appear that the plow is unbalanced, the witness Ogle, Jr. pointed out that it is, in fact, dynamically balanced force-wise, and his explanation of this is given starting [R. 1155].

It will be noted that each center of draft 40 and 41 is laterally offset from the longitudinal axis of rotation 18. When the carrier is rotated from full-line position to bring the left-hand gang of plows 20 into operating position, as indicated by dotted lines, the carrier 17 rotates around the longitudinal axis 18 and swings the carrier

into an eccentric position on the opposite side of this longitudinal line 18. When the parts are in this new position the line of draft is along the dotted line 42, and the center of draft is positioned on this dotted line at 41.

Based on this new concept [R. 1142] the entire plow structure, with the exception of the carrier 17 and parts supported thereby, remains in the *same* position behind the tractor, and more particularly, the tongue and the frame and the wheels and the longitudinal beam **do not shift laterally. These parts continue to occupy the same position on unplowed ground rearward of the tractor.**

This mode of operation is different from that in the 090 patent. A description of the construction and mode of operation of the 090 plow was given in the Party Atlas' Opening Brief, page 20, and was illustrated in Appendix A. Appendix A shows the manner in which the entire plow assembly shifts from a position on the right of the tractor to a position on the left of the tractor. In Exhibit AS, Appendix 2, in the lower view, this action is diagrammatically illustrated to show the magnitude of lateral movement of the *entire plow assembly* when the plow is shifted from one plowing position to the opposite plowing position. The witness Ogle, Jr.'s explanation of this action is found starting R. 1159 of the printed Record. Similar parts are indicated by the same numeral but using a prime after it.

Referring to the lower drawing in Appendix 2, the tractor 1′, has a right track 2′ and a left track 3′. The center of the drawbar pivot is indicated at 4′, and the line of draft extending through this point 4′ to a center of draft 40′ is indicated by the numeral 5′.

The 090 plow has a horizontally swingable tongue which is designated by the numeral 7′, this tongue being

pivoted at the forward end of the frame of the plow as designated at 16′. The center line of the frame is a longitudinal line 18′ on which the longitudinal beam 50′ of the plow is mounted. It will be noted that the center of draft in the Pursche plow indicated at the point 40′ **is located on this longitudinal axis 18′ of the longitudinal beam 17′.**

When the carrier is rotated to bring the left-hand plows into operating position as shown by dotted lines, the tongue 7′ is swung horizontally into the dotted line position, and the center of draft will be located along the broken line 42′. Because the center of the draft is on the longitudinal axis 18′ there must be a lateral shifting of the *entire plow assembly* from the full-line position behind the tractor on the right-hand side to the dotted-line position behind the tractor on the left-hand side.

This basic new concept of the new type Atlas plows which places the centers of draft 40 and 41 eccentric of the longitudinal axis 18, and the tongue with the diverging rails which lie along the lines of draft 5 and 42, provide a new mode of operation. It enables accomplishing a number of new results, one of which is the placing of the plow directly behind the tractor with wheels 14 and 15 running on unplowed ground.

Because of the design which allows both front wheels to run on unplowed ground numerous important advantages are achieved.

1. Atlas can obtain a full furrow depth on the first run [R. 541], whereas in the Pursche plow, because one wheel rides in a furrow a full depth of furrow cannot be plowed for three to five runs of the plow. Pursche said, "You can't get it down to the depth of the plow

right away, it takes about three or four or five passes to get it down to the required depth. * * *" [R. 233]. Atlas thus has full depth plowing across the entire plowed area. A related advantage is that in the Atlas plow the depth of cut can be changed at any place in the field [R. 542].

2. The Atlas plow can straighten a furrow at any time because the wheels run on unplowed ground [R. 542]. On the other hand, because of the Pursche plow having one wheel down in the furrow "* * * it might take you 15 or 20 rounds to get that field straightened out again. It is a very difficult problem." [R. 542].

3. Because both wheels run on unplowed ground, the plow will run evenly, whereas in the Pursche plow unevenness is caused by reason of clods falling into the furrow in which the wheel is running [R. 218-219].

4. Further advantages accrue to the Atlas plow because of a simple depth adjustment as compared to the Pursche three adjustment requirements [R. 217]. Also, there is no cross-wise leveling [R. 538-539] because both wheels ride on level ground, whereas in the Pursche plow there is a change in cross-wise leveling of the frame for each depth of furrow. In addition, since the axles extend horizontal and the wheels rotate in a vertical plane, there is no side loading such as occurs in the Pursche plow [R. 538-539].

Exhibit AT-1 [R. 1538] illustrates the new mode of operation of the new style Atlas plows in planing into the ground to plowing action and planing out of the ground to a raised position. This new mode of operation is described by the witness Ogle, Jr. commencing on page 1171 of the Record.

Referring to Appendix 3, which includes diagrammatic views of Exhibit AT-1 the witness Ogle, Jr. states that this exhibit includes four numbered sketches 1, 2, 3 and 4, which schematically illustrate a plow of the three-bottom B-4 type [R. 1171].

Fig. 1 discloses the plow in a lifted position, in which the wheels 14 and 15 are on unplowed ground and the gang of plows 19 are above the ground level.

The structure diagrammatically illustrated is that disclosed in the upper view in Exhibit AS, Appendix 2, except that the plow is a three-bottom rather than a four-bottom plow. The vertically swingable tongue 29 is pivotally connected at 6 to the draft link of the tractor 1. The rearward end of the tongue 29 is pivotally supported on the cross-shaft 11, which carries the arms 12 and 13 at opposite ends thereof, on which arms wheels 14 and 15 are rotatable.

Connected between the tongue 29 and the shaft 11 is a hydraulic cylinder and piston arrangement 32, the details of which are shown in Exhibits 20, 21 and 23, and also in the patent Appendix 1, which covers the new design of Atlas plows.

When it is desired to perform a plowing operation, the cylinder and piston arrangement 32 is extended and allows the frame to pivot from the position shown in Fig. 1 into the position shown in Fig. 2 [R. 1171]. It will be noted that this action is an action in which the frame 16 and longitudinal beam 17 are pivoted around the cross-shaft 11 to tilt the plowshares 19 into a position shown in Fig. 2, in which the plowshares will plane into the ground. This tilting action, it will be noted,

lowers the foremost plowshare 19a so that it starts to enter the ground while the other two plowshares are above the ground but angled in a downward direction.

As explained by the witness Ogle, Jr., during this entering action the wheel 14 may raise from the ground, the load being carried by the wheel 15 and the plowshares 19. As explained in the note below Fig. 2, this gives the same type of entry of the plows as in the old walking plow, and this gives extremely fast and easy penetration [R. 1171].

When the plows have fully entered the ground and are in full-depth plowing position, the parts of the plow occupy the position shown in Fig. 3. Because of the fact that in the new type Atlas plows the tongue is a free floating tongue, it may have a relatively large vertical pivoting action between the two broken lines, as indicated in Fig. 3, and in this way any unevenness of the ground being traveled over by the tractor is not transferred to the plow [R. 1172].

Fig. 4 illustrates the manner in which the plow is removed from the ground. The action which takes place is explained by the witness Ogle, Jr. [R. 1172]. It will be noted at this time that the frame 16 and carrier 17 are tilted relative to the tongue 29 in an opposite direction from that shown in Fig. 2. By this type of tilting action the forward end of the gang of plows is raised upward relative to the rearward end so that the plows tend to plane out of the ground as illustrated in Fig. 4.

The final position of the plow when the shares 19 are removed from the ground, is the position shown in Fig. 1.

It is important to note that the frame 16 and longitudinal beam 50 hinge around the axis of the cross-shaft 11

which is at a point near but slightly to the rear of the centers of the wheels 14 and 15. It will also be noted that the tongue 29 is swingable only in a vertical plane and that this tongue is swingable relative to the cross-shaft 11 and also relative to the frame 16 and longitudinal beam 50. By reason of this arrangement of the vertically pivoted tongue, the frame and longitudinal beam and the connecting of the single hydraulic cylinder 32 between the tongue 29 and the shaft 11, it is possible to tilt the forward end of the longitudinal beam into the position shown in Fig. 2 so that the plows will plane into the ground and it is also possible to tilt the longitudinal beam 50 as shown in Fig. 4 in order that the plows 19 will plane out of the ground. It will be noted that the tilting action of the longitudinal beam 50 is around the axis of the cross-shaft 11, which is near the forward end of the longitudinal beam 50. It will be noted that this tilting action is operable, *first,* to tilt the forward end of the beam so that it points downwardly, as in Fig. 2, or, *second,* to point the forward end of the beam upwardly relative to the rearward end so that it points upwardly as shown in Fig. 4.

On Exhibit AT-2 [R. 1539] Appendix 4, the witness Ogle, Jr. has made schematic views illustrating the manner in which the Pursche plow of the 090 patent enters and leaves the ground and he has also included a series of diagrams for showing the difference in mode of operation of these two plows with respect to these features. The witness's description of Exhibit AT-2, starts in the Record, page 1173.

Referring to Appendix 4, the first Fig. which has been marked Fig. 1, shows the position of the parts of the 090 plow when they are in a carrying position. In

this position the frame is raised relative to the wheels 13 and 14. In these Figs. of the 090 plow the numerals of the 090 patent have been added so that if desired the party Atlas' description of this plow commencing in the Opening Brief, page 20, may be resorted to for additional details.

The frame 12 is a rigid frame and the longitudinal beam 26 on which the plow carrier is rotatable is rigidly connected to the frame 12. A horizontally swingable tongue 70 is pivotally secured at 73 to the frame 12 and is also connected to the draft link of the tractor as indicated at 91.

This tongue 70 must be horizontally swingable in order to permit the shifting of the entire plow from one side to the other. However, the tongue cannot move in a vertical direction relative to the frame 12. As shown in the drawings of the 090 patent [R. 1549] the tongue is bifurcated so that a wall extends above and below the frame 12 and permits only a horizontal swinging of the tongue.

The beam 26, the frame 12 and tongue 70 are rigid in a vertical plane. There is no hinge point near the forward end of the longitudinal beam 26, such, for example, as the hinge point 11 in the new style Atlas plow. When the wheels 13 and 14 are moved relative to the frame 12 the beam, the frame and the tongue act as an integral rigid beam and hinge or tilt around the forward end of the tongue.

This is a vital difference from the new style Atlas plows in which the frame pivots around the cross-shaft 11 which is positioned near the forward end of the longitudinal beam 50 between the frame and the tongue 29.

The second sketch, marked Fig. 2, shows the 090 plow in plowing position. In view of the fact that the plow structure pivots around the forward end of the tongue as the frame and beam are lowered from the position shown in Fig. 1 into the position shown in Fig. 2, the angularity of the plows 17 to the ground diminish from the maximum angle in Fig. 2 into a substantially zero angle in Fig. 2 [R. 1173].

The witness Ogle, Jr. states: "Since the Pursche construction is a rigidly constructed unit from front to back in the elevation view, as the unit is lowered the angle of approach gets shallower as it approaches the ground." [R. 1174]. Thus it will be seen that in the lowering of the plows into the ground instead of tilting the plows so that they will plane into the ground, the plows are swung in an opposite direction and, therefore, do not plane into the ground as is the case with the new style Atlas plows, but are forced into the ground by the weight of the structure.

In the view on the right, which has been identified as Fig. 3, the action which takes place when the plow is raised from the ground, is illustrated. The witness Ogle, Jr. explains [R. 1174] that since the two wheels 13 and 14 are independent of each other, one will move relative to the other and the cylinder with the least load will always act first. In view of this, the initial action which occurs when the plow is moved from plowing position is "to point the shares in a downward direction because the entire structure is a rigid form of structure in the elevational view" [R. 1174]. As the wheels are lowered relative to the frame, which causes the frame to raise since the wheels are running on the ground, the action is to tilt the entire structure around the *forward end* of the

tongue 70. The parts of the plow will be moved from the position shown in Fig. 3 into the position shown in Fig. 1.

Now it will be noted that as this rigid structure of tongue 70, frame 12 and longitudinal beam 26 is titled around the forward end of the tongue 70, it is the rearward end of the longitudinal beam 26 which moves the greatest distance. As the plowshares 17 are raised from Fig. 3 to Fig. 1, the shares are gradually tilted into a steeper and steeper adverse angularity. This tilting of the plowshares causes a tendency for them to plane into the ground which is exactly the opposite action from that which is desired. The witness Ogle, Jr. explains this action as follows:

> "Now, when these shares point down on this initial movement this causes a tendency for the shares to want to dig deeper if the tractor is traveling forward. So consequently they resist the effort to raise them out of the ground.
>
> In addition to that, there is a superimposed soil load which must be pried loose, and that is carried up by the plow bases, so that the whole structure is pivoted around the tongue of the tractor and pried up around the wheels and rotates around the connecting point to the tractor." [R. 1175].

Schematic views A, B, C and D of the new style Atlas plows and schematic views E and F of the Pursche 090 plow are described briefly by the witness Ogle, Jr. in the Record 1175-1176.

To see the vast difference in operation of the two plows, it is only necessary to compare the views of Exhibit AT-1, Appendix 3, to the views of Exhibit AT-2, Appendix 4. The 090 plow lacks the mode of operation

resulting from the positioning of the hinge or pivot at 11 between the frame 16 and the vertically swinging tongue 29 in combination with the single hydraulic cylinder 32 mounted on the tongue and operatively connected to the cross-shaft 11.

Pursche's rigid structure, that is, rigid in a vertical plane, prevents the tilting action to feed the plows into the ground as shown in view 2 on Exhibit AT-1, and prevents the tilting in an opposite direction to feed the plowshares out of the ground as illustrated in view 4 on Exhibit AT-1.

At no time in the operation of the 090 plow is it possible to tilt the longitudinal beam 26 at a point near its forward end and to the rear of supporting wheels 13 and 14 to obtain the feed-in and feed-out positions illustrated in Figs. 2 and 4 of Exhibit AT-1.

All of the legends on the Exhibits AS, AT-1 and AT-2, are those put on the Exhibits by the witness Ogle, Jr. and constitute a part of his testimony.

The witness Ogle, Jr. states that the advantages of the new Atlas plows in planing into and out of the ground is the fast entering and reduction of high degrees of stress in the individual members of the structure. The method of planing out reduces the load imposed on the members considerably [R. 1176]. And, in his next answer, the witness explains the manner in which during feeding-in and feeding-out the plowshares resting on the floor of the furrow take a portion of the load [R. 1176-1177].

The Law of Different Mode of Operation.

The law of different mode of operation is stated in 69 C. J. S. 861, Section 292, as follows:

> "* * * a machine or device which performs the same function or accomplishes the same result by substantially different means, or by a substantially different principle or mode of operation or in a substantially different way does not infringe the patented invention."

This proposition of law is expounded in many Supreme Court and Lower Court decisions. For example, in *Union Paper Bag* case, 97 U. S. 121, the Supreme Court said:

> "* * * devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result." (P. 125.)

Walker on Patents, Dellers Edition, Volume 3, Section 496, page 1750, gives a comprehensive analysis of the law, and discusses six Supreme Court decisions.

The Ninth Circuit in *Air Devices, Inc. v. Air Factors,* 210 F. 2d 481, 483, said:

> "The fact that the two devices accomplish the same result, or perform the same function, settles nothing about infringement. (Authorities cited). Identity of result is no test. Stebler v. Porterville Citrus Ass'n, 9 Cir., 248 F. 927. As the results obtained are not secured by the same means, or by a device operated in the same manner, or in substantially the same manner, the several devices are not equivalents. Leishman v. Associated Wholesale Electric Co., 9 Cir., 137 F. 2d 722, 727."

The comparison of the new style Atlas plows and the 090 plow show most emphatically that the new style Atlas plows are a different combination having a different mode of operation from the 090 plow.

The Trial Court correctly found non-infringement even though the words of the claims were broad enough to read on the new style Atlas plows, since infringement is not a mere matter of words. See section of this Brief entitled "Infringement is Not a Mere Matter of Words" page 4.

Furthermore the Trial Court was correct in interpreting the claims in accordance with the well established principle stated in *McRoskey Mattress Co. v. Braun,* 107 F. 2d 143, wherein the Court said:

> "Whether the mattress depressing members of the frames described in the claims are conical-shaped or not, the claims do not state, but, since conical-shaped mattress depressing members are the only ones mentioned in the specification, it must be assumed that the mattress depressing members of the frames described in the claims are likewise conical-shaped. For the claims must be read in the light of the specification. Henry v. Los Angeles, 9 Cir., 255 F. 769, 780." (P. 146.)

The Court then, after citing *Grant v. Koppl,* stated:

> "* * * The evidence shows conclusively that, properly construed, the claims in suit were not infringed by appellee. That being so, it is immaterial —if true—that some of the claims read upon appellee's machine." (P. 147.)

THERE CAN BE NO INFRINGEMENT BECAUSE THE ELMENTS OF THE NEW STYLE ATLAS PLOWS ARE NON-INTERCHANGEABLE WITH AND NON-EQUIVALENT TO THE ELEMENTS OF THE 090 PLOW.

Law of Non-Infringement Where There Is Non-Interchangeability and Non-Equivalency.

The law abounds with authorities for this proposition. One Supreme Court decision and three Ninth Circuit Court decisions will be referred to.

The Supreme Court in *Miller v. Eagle Manufacturing Co.*, 151 U. S. 186, 208 stated:

> "The specific device described in and covered by the Wright patent could not be used in the appellants' combination, nor the appellants' spring in the appellees' combination. This interchangeability, or non-interchangeability, is an important test in determining the question of infringement. *Prouty v. Ruggles,* 16 Pet. 336; *Brooks v. Fiske,* 15 How. 212; *Eames v. Godfrey,* 1 Wall. 78."

In the Ninth Circuit, the following decisions are of interest:

> *Craftint v. Baker,* 94 F. 2d 369 at page 373 held:
> "* * * To infringe there must be identity of process or combinations of materials used with those described in the patent, *or their equivalents.* * * *" (Emphasis added.)

Leishman v. Associated Wholesale Electric Co., 137 F. 2d 722, 727, held:

> "* * * The plungers perform a part, and only a part, of the function performed by appellant's

levers F and 66. The part so performed is not performed in the same way, or in substantially the same way. Hence the plungers and the levers are not equivalents."

Wire Tie Mach. Co. v. Pacific Box Corporation, 102 F. 2d 543, held at page 556:

"* * * we feel that the ring gear of the Eby machine cannot be said to be the mechanical equivalent of the revolving arm of Parker '259. We therefore hold that the Eby machine does not infringe any of the claims in suit of Parker '259."

The vertically swinging tongue of Atlas and the horizontally swinging tongue of Pursche are non-interchangeable.

In the Atlas structure it is essential that there be a vertically pivoted connection immediately ahead of the forward end of the longitudinal beam, that there be a pivotal connection between the rearward end of the vertically swinging tongue and cross-shaft, and that there also be a pivotal connection between the cross-shaft and the frame.

In the Pursche structure the tongue cannot swing vertically because it must present in conjunction with the frame and the longitudinal beam, **one rigid construction** so that when the frame is raised the front end will be held from vertical movement and the parts will be tilted into the position, for example, as shown in Fig. 5 of the 090 patent.

This non-swingability of the tongue in a *vertical* plane is accomplished by bifurcating the tongue in order that horizontal walls are presented which permit hori-

zontal swinging movement but prevent vertical swinging movement of the tongue relative to the frame.

In the Pursche 090 structure the tongue *must be horizontally swingable* so that the entire plow can be laterally shifted from a right-hand offset position behind the tractor to a left-hand offset position behind the tractor in order that the two plowing operations may be performed.

In the Atlas structure the tongue must *not* swing horizontally because each of the side rails of the tongue must lie along the line of pull during the right-hand and left-hand plowing operations. Also, since the power cylinder is connected to the tongue a swinging of the tongue laterally from one position to another would prevent proper operation of the cylinder because you would always be changing the distance between the point of connection of the cylinder to the tongue and the mechanism operated by the piston rod extending therefrom.

The power cylinder mounted on the tongue of Atlas and the two-power cylinders independently mounted on the frame of Pursche are non-interchangeable.

In the Atlas plow the power cylinder *must be mounted on the tongue* to accomplish the new mode of operation previously discussed. In the 090 plow the power cylinders cannot be mounted on the tongue for various reasons. In the first place, since the 090 tongue is horizontally swingable a connection of the power cylinder to the tongue is impossible. Also, the 090 structure must have two independently adjustable power cylinders, one for each wheel in order that the lateral tilted position of the frame may be set for each independent depth of cut.

The Pursche plow must have *two power lift cylinders on the frame,* one for independent adjustment of each

wheel, whereas the Atlas structure must *not* have any power cylinder on the frame because such an arrangement would defeat its new mode of operation.

A single power cylinder is possible in the Atlas structures because the two wheels are mounted on arms which are secured to the cross-shaft and these two wheels act as a unit [R. 543]. They are secured together and must move in unison. This structure is made possible due to the fact that the plow is always running on unplowed ground whether the plows are in the ground or in a raised position. You, therefore, never have to make any independent adjustments of the wheels because of transverse tilting of the frame.

In the Pursche plow, on the other hand, where the frame operates in a transverse tilted position and in which separate wheel adjustments must be made, *the wheels must be separately mounted,* they do not raise in unison and there must be two lift cylinders, one for each wheel [R. 544].

Numerous advantages result from the unique arrangement of the tongue vertically pivoted at its rearward end and the hydraulic cylinder mounted on the tongue. One important advantage is that in the Atlas arrangement it is not necessary for the cylinder to support the frame in any way during plowing operation. The cylinder can rest free without any load on it [R. 543].

Also, when the plow is in plowing position the cylinder does not interfere with the free vertical swinging movement of the tongue [R. 543]. Because of this important feature, if there is any unevenness of the ground over which the tractor is moving, the oscillating movement of the tractor is not transferred to the plow.

In the Atlas plow the hinging relationship immediately ahead of the forward end of the longitudinal beam between the tongue and the frame and the rigid frame and tongue arrangement of Pursche are non-interchangeable.

In the Atlas plow there must be a hinging action immediately ahead of the longitudinal beam in order to get the planing in and planing out action illustrated in Exhibit AT-1, Appendix 3.

On the other hand, in the 090 plow, the frame and tongue and longitudinal beam must be a rigid structure in a vertical plane in order to obtain the tilting action from the forward end of the tongue which lifts the entire length of the beam member. Substituting the rigid arrangement of Pursche for the hinging tongue and frame arrangement of Atlas is impossible and would entirely destroy the new mode of operation of the Atlas method of planing in and planing out of the ground by raising or lowering the forward end of the longitudinal beam relative to the rearward end thereof.

From the foregoing it is believed to be clearly established that the Atlas plows are a different combination and have a different mode of operation and that the essential elements of Atlas and Pursche are non-interchangeable and non-equivalent.

As a result of the new combination of the Atlas plows many parts corresponding to those of the 090 plow are not necessary. The expert witness Fishleigh [R. 995-1004] makes a comparison of the Atlas new style plow and the plow of the 090 patent from the standpoint of parts which have been eliminated [R. 1005]. The witness Fishleigh has identified the parts which have been

eliminated by giving the numbers of these parts in the 090 patent. A comparison of the Atlas and Pursche plows shows the remarkable simplicity of the Atlas new-style plows resulting from the unique conceptions resulting in the new combination and the new mode of operation.

In view of the foregoing, it is respectfully submitted that not only has the party Pursche failed to make the required showing necessary to have this Court reverse Finding of Fact 29, but the party Atlas has, in this section, convincingly shown that the evidence in the case more than adequately supports the Finding that the Atlas new-style plows comprise a new combination of elements having a different mode of operation from the plow disclosed in the 090 patent.

THE ISSUANCE OF PATENT 519, EXHIBIT AR [R. 1527] WHICH COVERS THE NEW STYLE ATLAS PLOWS, RAISES A PRESUMPTION OF NON-INFRINGEMENT.

The new style B-3, B-4, B-6 and B-7 Atlas plows of Exhibits 20, 21 and 23 are disclosed in and are covered by the 519 patent, Exhibit AR [R. 1527].

Starting in the Record at page 1139, the witness Ogle, Jr. describes the patent and points out wherein it discloses and claims the new style Atlas plows.

The Pursche 090 patent was cited as a reference and the claims were allowed over this patent [R. 1140].

The claims of Exhibit AR cover the new combinations of elements embodied in the B-3, B-4, B-6 and B-7 plows.

The basic combination of the vertically swinging tongue with the power cylinder mounted on the tongue is defined by claims 1 and 3 of that patent. The structural

arrangement which enables the plowshares to plane in the ground and out of the ground is defined in claims 5, 6 and 7.

The unique combination of the front wheels rolling on unplowed ground resulting from the use of the eccentrically mounted gangs of plows coupled with the vertically pivoted tongue (and which cannot swing horizontally) in conjunction with the designing of the tongue in the shape of an A-frame, and the placing of one leg of the A-frame in one line of draft and the other leg of the A-frame in the other line of draft when opposite plowshares are in operation, are covered in different degrees of broadness by all of the claims.

The combination of the vertically swingable *free-floating* tongue is defined by claims 4 and 11.

The bypass arrangement which gives the vertically pivoted tongue its freedom of vertical movement is defined in claim 12.

Not only do the new style Atlas plows have a different combination and mode of operation, but these differences are of a patentable character and, therefore, carry a special significance.

There are a number of Ninth Circuit cases and Supreme Court cases which state that the issuance of a patent covering a structure charged to infringe, raises a presumption of non-infringement. This presumption is not necessarily an irrebuttable presumption. But, in the present situation, where the differences are great and where the combination of elements is a different combination having a different mode of operation, it is believed that the presumption of non-infringement is a strong presumption and more difficult to rebut.

Certainly in this case there is no evidence which in any way seeks to or has the effect of rebutting this presumption.

The law on this subject finds its basis in a number of decisions, and particularly in the following:

Corning v. Burden, a decision of the Supreme Court of the United States, 56 U. S. 252, 271;

Ransome v. Hyatt (C. A. 9), 69 Fed. 148;

Western Well Works v. Layne & Bowler Corporation (C. A. 9), 276 Fed. 465, 472;

Mastoras v. Hildreth (C. A. 9), 263 Fed. 571, 575 on certiorari before the Supreme Court, 257 U. S. 27, 36 and 37;

Dunkley v. Central California Canneries (C. A. 9), 7 F. 2d 972, 977.

THE TRIAL COURT DID NOT ERR IN HOLDING CLAIM 1 OF THE 090 PATENT TO BE INVALID.

Claim 1 is a broad claim directed to an aggregation of parts including a single supporting wheel of the type disclosed in the Unterilp Patent, Exhibit A-79 [R. 1491]. The claim is invalid for the various reasons pointed out in the party Atlas Opening Brief with respect to claim 3, which is representative of the group of claims 1 to 4 inclusive, 14 and 17. See the Atlas Opening Brief page 80.

Claim 1 includes the following elements:

1. The frame,
2. The carrier,
3. The right and left-hand plows,
4. The means for rotating the carrier, and
5. The rear supporting wheel.

This is but five of the twelve necessary elements of the 090 plow. See Appendix C of the Party Atlas Opening Brief.

Claim 1 is invalid because it is incomplete and inoperative, for the reasons pointed out in the FIRST POINT of the Party Atlas Opening Brief commencing on page 52.

Claim 1 also is invalid because it defines an aggregation. See the Party Atlas argument under its SIXTH POINT, page 80 of the Party Atlas Opening Brief.

Claim 1 also is invalid because it is unsupported by a Finding that the elements thereof perform an additional and different function in combination than they perform out of it. See the argument under THIRD POINT, page 59, of the Atlas Opening Brief.

It is noted that Pursche cites *Union Switch & Signal Co. v. Kodel Electric & Mfg. Co.,* 55 F. 2d 173 (Pursche Op. Br. p. 13), which case is believed to support the Party Atlas' position that claim 1 is invalid. Claim 1 is incomplete and covers an inoperative structure. The party Pursche himself testified that his 090 plow without a means for raising and lowering the plows from the ground would be an inoperative structure. Claim 1 does not include this raising and lowering means.

It is respectfully submitted that the facts and the law clearly show that the Trial Court was correct in holding claim 1 of the 090 patent invalid.

THE TRIAL COURT DID NOT ERR IN REQUIRING EACH PARTY TO BEAR ITS OWN COSTS.

The Trial Court did not err in failing to award costs to Pursche. 35 U. S. C. A., Section 284, reads in part as follows:

> "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, *together with interest and costs as fixed by the court.*" (Emphasis added.)

Substantially the same language was used in the prior statute, 35 U. S. C. A., Section 70.

The Courts in construing these sections have uniformly held that the matter of costs in a patent infringement action rests in the sound discretion of the Trial Court.

> *Refrigeration Engineering v. York Corporation* (C. A. 9), 168 F. 2d 896;
>
> *White Cap Co. v. Owens-Illinois Glass Co.* (C. A. 6), 203 F. 2d 694, certiorari denied 346 U. S. 876.

The Trial Court decided many of the issues of this case against Pursche. It found and concluded that the new-style Atlas plows, as shown in Exhibits 20, 21 and 23, do not infringe any patents in suit and that claim 1 of the 090 patent was invalid. Note the 11 alleged errors specified in the Specification of Errors on page 4 in Pursche's Opening Brief.

> "Where a party, in a suit for infringement of a patent, is successful only in part, the court, in its

discretion, may award costs to him, award no costs, or divide the costs." 69 C. J. S., Sec. 338(b), p. 1061.

"Since these cases were consolidated for trial and neither party has entirely prevailed, it would appear that each should bear its own costs."

Q-Tips, Inc. v. Johnson & Johnson, 108 Fed. Supp. 845, 871, Affirmed 206 F. 2d 144.

The case cited by Pursche, namely, *Overman Cushion Tire Co. v. Goodyear Tire & Rubber Co.* (C. A. 2), 40 F. 2d 460, does not sustain his position. In that case the District Court awarded costs to the plaintiff who prevailed only on two claims and failed to establish the validity of a reissued patent. The patents were so related that the action was presumably tried with little or no additional expense because the reissue was involved. The Appellate Court held "* * * There was an insufficient showing by the appellant to warrant any interference *with the discretion of the trial court* in awarding full costs. * * *" (Emphasis added).

CONCLUSION.

It is respectfully submitted that the Court was correct in its holding of non-infringement, invalidity of claim 1, and in the dividing of costs; and that the portion of the Court's decision involved in the appeal by the party Pursche should be affirmed.

Respectfully submitted,

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APPENDIX 1.

Chandler et al., Patent No. 2,830,519.

No. 16,415

In the United States Court of Appeals for the Ninth Circuit

PAUL LUSTIG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

HALINA LUSTIG, RESPONDENT

On Petitions for Review of the Decisions of the Tax Court of the United States

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BRIEF AND APPENDIX FOR THE COMMISSIONER

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BRIEF AND APPENDIX FOR THE COMMISSIONER

OPINION BELOW

The findings of fact and opinion of the Tax Court (Appendix, *infra*) are reported at 30 T.C. 926.

JURISDICTION

The petitions for review involve federal income tax for the year 1954. The Commissioner determined a deficiency in the income tax of Halina Lustig and mailed a notice of deficiency to her in the amount of

$186.58. (F.F. Appendix, *infra.*)[1] Within ninety days after the notice of deficiency was mailed and on January 9, 1957, Halina Lustig filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. (Docket Entries, Appendix, *infra.*) The Commissioner determined a deficiency in the income tax of Paul Lustig and mailed a notice of deficiency to him in the amount of $115. (F.F., Appendix, *infra.*) Within ninety days after the notice of deficiency was mailed and on July 31, 1956, Paul Lustig filed a petition with the Tax Court for a redetermination of that deficiency under the provisions of Section 6213 of the Internal Revenue Code of 1954. The decisions of the Tax Court were entered on October 17, 1958. (Docket Entries, Appendix, *infra.*) The cases were brought to this Court by a petition for review filed by Paul Lustig on January 15, 1959, and by a protective petition for review in the wife's case filed by the Commissioner on December 31, 1958. (Docket Entries, Appendix, *infra.*) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the record supports the Tax Court's finding that Halina Lustig, rather than Paul Lustig, contributed more than one-half of the support for their minor son, with the result that Halina was entitled to the dependency exemption under Sections 151 and 152, Internal Revenue Code of 1954.

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[1] For the purpose of brevity, the Tax Court's findings of fact will be referred to as "F.F.".

STATUTES INVOLVED

Internal Revenue Code of 1954:

SEC. 151. ALLOWANCE OF DEDUCTIONS FOR PERSONAL EXEMPTIONS.

(a) *Allowance of Deductions.*—In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income.

* * * *

(e) *Additional Exemption for Dependents.*—

(1) *In General.*— An exemption of $600 for each dependent (as defined in section 152)—

(A) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than $600, * * *.

* * * *

(26 U.S.C., 1958 ed., Sec. 151.)

SEC. 152. DEPENDENT DEFINED.

(a) *General Definition.*—For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) as received from the taxpayer):

(1) A son or daughter of the taxpayer, or a descendant of either,

* * * *

(26 U.S.C., 1958 ed., Sec. 152.)

STATEMENT

The facts as found by the Tax Court in these consolidated cases may be stated as follows:

The taxpayers, Halina and Paul Lustig, were husband and wife who were separated in 1954, the tax year involved, and later divorced. They filed separate income tax returns for 1954. Both claimed their minor son William as a dependent on their tax returns. Halina also claimed a deduction of $600 for child care expenses. (F.F., Appendix, *infra.*)

Halina expended not less than $950 for the support of her minor son William during 1954. This was more than one-half of his support. (F.F., Appendix, *infra.*)

Halina paid not less than $775 for child care during 1954 for the purpose of enabling herself to be gainfully employed. (F.F., Appendix, *infra.*)

The Commissioner disallowed the claimed exemption for William to both taxpayers and also disallowed the claimed deduction for child care to Halina. The Tax Court determined that Halina contributed more than one-half for the support of William and that she was entitled to the dependency exemption for William and to the deduction for child care expenses. (F.F., Appendix,*infra.*)

Because the husband Paul Lustig has appealed, and because only one of the taxpayers may be allowed the dependency exemption, the Commissioner has appealed in the wife's case in order to protect the revenue in the event that this Court should reverse the Tax Court's decision in Paul Lustig's case.

STATEMENT OF POINTS TO BE URGED

1. The dependency exemption may be allowed to the taxpayer involved who contributed more than one-half of the support for the dependent; thus only one of the taxpayers, either Halina or Paul, may be allowed the dependency exemption.

2. In determining which of the taxpayers contributed more than one-half of the support for the dependent child, the Tax Court correctly took into account the amount Halina Lustig expended in caring for the child to enable her to be gainfully employed.

3. The record fully supports the Tax Court's finding that Halina expended not less than $950 for the support of the dependent, which was more than one-half of the support.

4. If this Court should reverse the Tax Court's decision in Paul's case, then the Tax Court's decision in Halina's case should also be reversed.

ARGUMENT

I

The Record Fully Supports the Tax Court's Finding That Halina Lustig, Rather Than Paul Lustig, Contributed More Than One-Half of the Support for Their Minor Son, With the Result That Halina Was Entitled to the Dependency Exemption Under Sections 151 and 152 of the Internal Revenue Code of 1954

Sections 151 and 152 of the Internal Revenue Code of 1954, *supra*, allow a dependency exemption to the taxpayer who contributes more than one-half of the support for a minor son whose gross income is less

than $600. The only question here is the factual one of which of these taxpayers contributed the requisite amount and, hence, was entitled to the exemption. The Tax Court found that Halina expended not less than $950 for the support of the dependent son, and that this was more than one-half of the son's support.

The amount expended by Halina for the son's support, according to Halina's testimony, was $939.57. (Tr. 40, Appendix, *infra.*) This amount included the cost of such items as clothing, milk, vitamins, medical care and medicines, food and dry cleaning. (Tr. 35, 37-39, Appendix, infra.) There is no question that the cost of such items are properly includible in determining the amount expended for support. *Jordan* v. *Commissioner*, decided August 12, 1958 (1958 P.H. T.C. Memorandum Decisions, par. 58,152); *Atchison* v. *Commissioner*, decided July 17, 1958 (1958 P.H. T.C. Memorandum Decisions, par. 58,140). The record further shows that Halina spent $776.20 for the care of the son while she was gainfully employed to earn money for his support. (Tr. 41, Appendix, *infra.*) The amount spent for child care was included by the Tax Court in determining whether Halina spent more than one-half for the son's support. The child care expenditure was properly taken into account because as the Tax Court aptly observed in *Lovett* v. *Commissioner*, 18 T.C. 477, 478:

> Any reasonable amount paid others for actually caring for children as an aid to the parent is a part of the cost of their support.

The allowance of a deduction not exceeding $600 for child care expenses, by Section 214 of the Internal

Revenue Code of 1954, does not require excluding such expenses when determining the amount expended for support. The child care expenses deduction was intended as a deduction in addition to the dependency exemption, for the purpose of enabling a taxpayer (here the wife) to be gainfully employed. See H. Rep. No. 1337, 83d Cong, 2d Sess., pp. 30, A60 (3 U.S.C. Cong. & Adm. News (1954) 4055, 4197); S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 35, 220 (U.S.C. Cong. & Adm. News (1954) 4666, 4856). The record, therefore, fully supports the Tax Court's finding that Halina spent not less than $950, which was more than one-half of the son's support, and this factual finding should not be disturbed since Paul has not shown it to be clearly erroneous.

The Tax Court found that at most Paul expended $619.[2] Assuming that the $619 amount is entirely correct, Paul has not contributed more than one-half of the son's support on any theory. Even if the amount ($400) claimed by Paul to have been paid to Halina is subtracted from the expenditures of Halina totalling $939.57, the balance is $539.57; adding to that balance the $776.20 spent by Halina for child care makes a total of $1,315.77 expended by Halina solely from her funds for the son's support. Thus Paul's contribution for the son's support, assuming the accuracy of the amounts claimed by him, is less than Halina's.

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[2] This amount consisted of $400 allegedly paid by Paul to Halina for the son's support (Tr. 20), estimated expenditures of $215.50 (Tr. 24, 28-29) and substantiated expenditures of $3.50 (Tr. 28-29).

II

If the Tax Court's Decision Is Reversed In Paul's Case, It Must Also Be Reversed In Halina's Case

Since Halina contributed more than one-half of the son's support, the Tax Court correctly held that she, rather than Paul, was entitled to the dependency exemption.

Nonetheless, the Commissioner has appealed in Halina's case for protective reasons, because only one of the taxpayers involved may be allowed the dependency exemption. Hence, if this Court should reverse the Tax Court's decision in Paul's case, the decision in Halina's case must also be reversed.

CONCLUSION

The Tax Court's decisions are correct and should be affirmed. However, should this Court reverse the decision in Paul's case, the decision in Halina's case must also be reversed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

LEE A. JACKSON,
HARRY BAUM,
CHARLES B. E. FREEMAN,
Attorneys,
Department of Justice,
Washington 25, D. C.

SEPTEMBER, 1959.

APPENDIX

Docket No. 65477

HALINA LUSTIG, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

APPEARANCES

For Petitioner:
For Respondent:

DOCKET ENTRIES

1957

Jan 9—Petition received and filed. Taxpayer notified. Fee paid.
Jan 10—Copy of petition served on General Counsel.
Feb 15—Answer filed by Resp. Served 2/26/57.
Feb 15—Request for Circuit hearing in San Francisco filed by Resp. 2/25/57 Granted.
Oct 22—Notice of Trial, January 20, 1958, at San Francisco, Calif.
Dec 4—Motion by Petr. for leave to file amendment to pet.; amendment to pet. lodged. 12/18/57 Granted.
Dec 5—Notice of hearing Dec. 18, 1957, Washington, D. C., on petitioner's motion. Served 12/5/57.
Dec 18—Motion of Dec. 4, 1957, is Granted. Served 12/19/57.

1958

Jan 8—Answer to amendment to petition by Resp. Served 1/9/58.
Jan 21—Trial had before Judge Tietjens on merits and Resp. motion to consolidate with

1958

63603. Granted—Served. Briefs due 3/7/58; Replies due 4/7/58.

Feb 10—Transcript of Hearing 1/21/58 filed.

Mar 6—Brief for Paul Lustig, Petitioner in Dkt. 63603, filed. Served 3/14/58.

Mar 7—Motion by Resp. for extension of time to March 14, 1958, to file brief. Granted 3/11/58. Served 3/12/58.

Mar 13—Brief for Respondent filed. Served 3/14/58.

Mar 31—Motion by Paul Lustig, Petr. in Dkt. 63603, for extension of time to file substitute brief for the brief filed 3/13/58. Denied 4/1/58. Served 4/2/58.

Mar 31—Reply Brief for Paul Lustig, Petr. in Dkt. 63603, filed. Served 4/16/58.

Apr 4—Motion by Paul Lustig, Petr. in Dkt. 63603, to amend reply brief. 4/7/58 Granted.

July 15—Findings of Fact and Opinion filed. Judge Tietjens. Dec. will be entered under R. 50. Served 7/15/58.

Aug 13—Motion by Petr. to vacate or reconsider opinion filed 7/15/58. Denied 8/25/58. (Paul Lustig, petr. in Dkt. 63603).

Aug 25—Order and Memorandum Sur Order filed. Judge Tietjens.

Sept 17—Agreed comp. filed.

Oct 17—Decision entered, Judge Tietjens.

Dec 31—Petition for review by U.S.C.A. 9th Circuit, filed by G. C.

1959

Feb 6—Motion for extension of time to file record on rev. and docket pet. for rev. to Mar. 31, 1959, filed by petr. on rev.

1959

Feb 6—Order extending time to file record on rev. docket pet. for rev. to Mar. 31, 1959. Served 2/9/59.

Feb 12—Designation of record on rev., with proof of service thereon, filed.

Mar 12—Proof of service of petition for review filed.

[Caption Omitted]

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in her notice of deficiency Ap:SF:AA:LT:90-D-WHLY, dated November 27, 1956, and as a basis for her proceeding alleges as follows:

1) The petitioner is an individual with residence at 390 - 17th Avenue, San Francisco, California. The return for the period here involved was filed with the District Director of Internal Revenue at San Francisco, California.

2) The notice of deficiency, a copy of which is attached and marked Exhibit A, was mailed to the petitioner on November 27, 1956.

3) The taxes in controversy are income taxes for the calendar year 1954, and in the amount of $186.56.

4) The determination of the tax set forth in the said notice of deficiency is based upon the following error: the disallowance of a dependency exemption for her son, William Burton Lustig.

5) The facts upon which the petitioner relies as the basis for this proceeding are as follows:

a) William Burton Lustig was dependent upon the petitioner for support for the calendar year 1954.

b) The petitioner contributed over half the total amount expended for the support of the dependent named above.

Wherefore the petitioner prays that this Court may hear the proceeding and allow the petitioner an exemption for the dependent named in the petition and to determine that there is no deficiency in the amount of taxes payable by the petitioner for the year ended December 31, 1954.

Halina Lustig
Petitioner
390 - 17th Avenue
San Francisco
California

Exhibit A

Form 1230 (App.)
[SEAL]
In replying refer to
Ap:SF:AA:LT
90-D:WHLy

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Regional Commissioner

Appellate Division—San Francisco Region
Room 1010—870 Market Street
San Francisco 2, California

Mrs. Halina Lustig
390 - 17th Avenue
San Francisco, California

Dear Mrs. Lustig:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1954 discloses a deficiency or deficiencies of $186.58 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States, at its principal address, WASHINGTON 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia in which event that day is not counted as the 90th

day. Otherwise Saturdays, Sundays, and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Rm. 1010, 870 Market St., San Francisco 2, California. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is the earlier.

Very truly yours,

RUSSELL C. HARRINGTON
Commissioner

By
Special Assistant
Appellate Division

Enclosures:

Statement
IRS Pub. 160
Agreement Form

STATEMENT

Mrs. Halina Lustig
390 - 17th Avenue
San Francisco, California

Tax Liability for the Taxable Year Ended December 31, 1954

Year		Deficiency
1954	Income Tax	$ 186.58

In your return you claim a deduction for an exemption of $600.00 on the basis of the support of your son, William B. Lustig. This deduction is disallowed because you have not shown that the amount contributed by you during the year 1954 constituted more than half of the support of the child.

In making this determination of your income tax liability, careful consideration has been given to your protest dated September 26, 1956 and to the statements made at the conference held on October 25, 1956.

Year: 1954

ADJUSTMENTS TO INCOME

Net income as disclosed by return		$ 2,317.11
Unallowable deductions and additional income:		
(a) Child care	$ 600.00	
(b) Taxes	22.89	622.89
Adjusted gross income as corrected		$ 2,940.00

EXPLANATION OF ADJUSTMENTS

(a) The deduction of $600.00, representing child care, has been disallowed inasmuch as the dependent

for whom the expense was incurred has been disallowed.

(b) Inasmuch as the remaining allowable deduction of $22.89 is less than the standard deduction, itemized deductions have been disallowed, and your tax liability has been determined from the Tax Table.

COMPUTATION OF INCOME TAX

Adjusted gross income	$ 2,940.00
Income tax liability from Tax Table (One exemption)	$ 410.00
Income tax reported on return Original Account No. OR 1843 list 55 First California District	223.42
Deficiency in income tax	$ 186.58

[Caption Omitted]

ANSWER

THE RESPONDENT, in answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

1), 2), and 3). Admits the allegations in paragraphs 1), 2), and 3).

4). Denies that the Commissioner erred in the determination of the deficiency as alleged in paragraph 4).

5), a) and b). Denies the allegations of subparagraphs a) and b) of paragraph 5.

6). Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the Commissioner's determination in all respects be approved and the petitioner's appeal denied.

(signed) Herman T. Reiling
HERMAN T. REILING M. L. S.
Acting Chief Counsel
Internal Revenue Service

OF COUNSEL:

Melvin L. Sears, Regional Counsel
T. M. Mather, Assistant Regional Counsel
Nat F. Richardson, Attorney
Internal Revenue Service
1069 Flood Building
San Francisco 2, California

NFR:sp—2/ 2/5/57

[Caption Omitted]

AMENDMENT OF PETITION

In addition to issues raised in original petition it is requested that the TAX COURT OF THE UNITED STATES also give consideration to the allowance of $600.00 of claim deducted for child-care as shown in original petition. The petitioner did contribute the chief support of the child claimed as a dependent and included therein is the amount of $600.00 expended by the petitioner for child-care.

In addition it is requested that the Court also give consideration for allowance of deduction of State Income Tax in the amount of $6.71 and for Social Security Tax for baby-sitters in the amount of $16.18, a total of $22.89.

Wherefore the petitioner prays that this Court may hear the proceeding and allow the petitioner an exemption for the dependent named in the original petition and also allow petitioner the deductions named in this amendment of petition.

Halina Lustig
Petitioner
390 - 17th Ave
San Francisco
California

[SEAL]

[Caption Omitted]

FINDINGS OF FACT

Petitioners who were husband and wife were separated from each other in February 1954, and later divorced. They filed separate income tax returns for 1954 with the district director of internal revenue at San Francisco, California.

Both claimed their minor son William as a dependent on their tax returns. Halina also claimed a deduction of $600 for child care pursuant to section 214, I. R. C. 1954.

Halina expended not less than $950 for the support of her minor son William during 1954. This was more than one-half of his support.

Halina paid not less than $775 for child care during 1954 for the purpose of enabling Halina to be gainfully employed.

The Commissioner disallowed the claimed exemption for William to both petitioners and also disallowed the claimed deduction for child care to Halina. The ground for this action was that neither petitioner had shown that he or she had contributed more than half of the support of the child.

[Caption Omitted]

OPINION

The questions are in the main questions of fact and are disposed of by our findings.

At most Paul paid some $619 for the son's support in 1954. We have found as a fact that Halina paid at least $950 for the child's support with the result that she is entitled to claim him as a dependent. The amount paid by Halina includes the amount ex-

pended for child care. Paul contends that amounts paid for child care are not properly includible in determining whether or not a taxpayer has contributed more than one-half of the support of a claimed dependent. We have held otherwise. *Thomas Lovett*, 18 T. C. 477. There we said, "Any reasonable amount paid others for actually caring for children as an aid to the parent is a part of the cost of their support."

That case was decided under the Internal Revenue Code of 1939. However, we find nothing in the Internal Revenue Code of 1954 which would require us to depart from its holding. Section 214 of the 1954 Code allows "as a deduction expenses paid during the taxable year by a taxpayer * * * for the care of one or more dependents * * * but only if such care is for the purpose of enabling the taxpayer to be gainfully employed." The deduction may not exceed $600 for any taxable year. No such deduction was provided for in the 1939 Code and Paul argues, in a manner not entirely clear to us, that this change in the law now makes it improper to include the cost of child care in determining dependency. We cannot follow this reasoning. Section 214 lays down no new rules for determining who furnished over half the support of a claimed dependent. In this respect we think the *Lovett* case is still the law and point out in passing that the Commissioner does not here contend otherwise.

Having held that Halina is entitled to the dependency exemption and having found that she paid not less than $775 for child care in 1954 for the purpose of enabling her to be gainfully employed, it follows that she is entitled to a deduction of $600 under section 214, *supra*.

Decisions will be entered under Rule 50.

[Caption Omitted]

DECISION

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed July 15, 1958, the parties having filed on September 17, 1958, an agreed computation of tax, now therefore, it is

ORDERED and DECIDED: That there is no deficiency in income tax for the taxable year 1954.

ENTER:

Judge

[Caption Omitted]

PETITION FOR REVIEW

The Commissioner of Internal Revenue hereby petitions the United States Court of Appeals for the Ninth Circuit to review the decision entered by the Tax Court on October 17, 1958, pursuant to its findings of fact and opinion filed July 15, 1958 (30 T.C. #94), ordering and deciding that there is no deficiency in income tax for the year 1954.

This petition for review is filed pursuant to the provisions of Sections 7482 and 7483, and other applicable sections of the Internal Revenue Code of 1954, and in order to protect the revenue in the event that the taxpayer in the companion case of *Paul Lustig* v. *Commissioner*, Docket No. 63603, appeals to this Court.

JURISDICTION

Respondent on Review, Halina Lustig, is an individual with residence at San Francisco, California, and filed her federal income tax return for the year

1954, the year involved herein, with the District Director of Internal Revenue at San Francisco, California, which collection office is within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought.

Nature of Controversy

Taxpayer, Halina Lustig and her husband, Paul Lustig were separated from each other in February, 1954, and were later divorced. They filed separate income tax returns for 1954 in which each claimed a deduction of $600 as an exemption for their minor son, William. In order to protect the revenue the Commissioner disallowed the deduction in both cases. The Tax Court found that taxpayer, Halina Lustig, provided more than one-half of the son's support during 1954, and accordingly held that she is entitled to the deduction.

This appeal is filed merely to protect the revenue in the event that if Paul Lustig appeals the decision in Docket No. 63603 and this Court should reverse the Tax Court decision in that case, the instant case will also be before the Court for its determination.

(Signed) Charles K. Rice
Charles K. Rice
Assistant Attorney General

(Signed) Arch M. Cantrall
Arch M. Cantrall
Chief Counsel
Internal Revenue Service
Counsel for Petitioner on Review

Of Counsel:

Charles P. Dugan
Attorney
Internal Revenue Service

[Caption Omitted]

DESIGNATION OF RECORD ON REVIEW

To the Clerk of the Tax Court of the United States:

In accordance with Rule 29 of the United States Court of Appeals for the Ninth Circuit, please prepare, transmit and deliver to the Clerk of the United States Court of Appeals for the Ninth Circuit, originals of the following documents in the above-entitled case in connection with the petition for review heretofore filed by the Commissioner of Internal Revenue, petitioner herein:

1. Docket entries
2. Pleadings:
    a. Petition
    b. Answer
    c. Amendment to the Petition
    d. Answer to amendment to petition
3. Motion for consolidation of proceedings in the Tax Court
4. Transcript of the oral testimony at the trial
5. All exhibits
6. The findings of fact and opinion of the Tax Court
7. Decision
8. Petition for review and notice of filing thereof
9. This designation of record on review.

(Signed) Charles K. Rice
Charles K. Rice
Assistant Attorney General

(Signed) Arch M. Cantrall
Arch M. Cantrall
Chief Counsel
Internal Revenue Service
Counsel for Respondent

STATEMENT OF SERVICE:

I certify that a copy of this designation of record on review was mailed to Halina Lustig, Respondent on Review, this twelfth day of February, 1959,

(Signed) Charles P. Dugan
CHARLES P. DUGAN
Attorney
Internal Revenue Service

[Caption Omitted]

Testimony of Halina Lustig:

[Tr. 31]

THE CLERK: Will you so specify your name for the record?

THE WITNESS: My name is Halina Lustig.

THE COURT: Your address, please?

THE WITNESS: 390 - 17th Avenue.

THE CLERK: Thank you.

MR. RICHARDSON: If your Honor please, would it be a proper suggestion if I examined Mrs. Lustig?

THE COURT: It might be very helpful, if she has no objection to it.

THE WITNESS: No objection, your Honor.

THE COURT: All right.

The Clerk was wondering how to characterize this witness on the minutes. I would take it that she is appearing for herself?

MR. RICHARDSON: She is a Petitioner.

THE COURT: That is right. She is a Petitioner.

DIRECT EXAMINATION

By Mr. Richardson:

Q Mrs. Lustig, during the year 1954 where did you live?

[Tr. 32]

A At 1730 Broderick.

Q Did you live there that entire year?

A Yes, I did.

Q Mrs. Lustig, do you have records of the expenses, particularly with reference to your child, that you have made during that year?

A I have a receipt for the rent from the real estate company, Umbsen, Kerner & Stevens.

Q How much is that?

A The total for the year was $581.25.

Q Now, you have receipts for that?

A For this I have a receipt.

Q Do you have it with you?

A Yes, sir.

Q Let me see it, please.

Mrs. Lustig, do you have any objection to this being made an exhibit?

A No, sir.

MR. RICHARDSON: I will show it to Mr. Lustig.

MR. LUSTIG: Your Honor, there is a difference of $6, a difference of which we will waive, certainly.

MR. RICHARDSON: I don't know what his objection is, if your Honor please. I wish to offer this as an exhibit. It was identified by Mrs. Lustig.

THE COURT: It will be admitted.

[Tr. 33]

THE CLERK: Petitioner's Exhibit No. 2.

THE COURT: Petitioner Mrs. Lustig. There are two Petitioners.

THE CLERK: I don't want to have two sets of numbers, though, your Honor.

MR. RICHARDSON: Under consolidation of cases, would that—

THE CLERK: That would be correct, would it not, your Honor?

THE COURT: All right. It doesn't make any difference.

Admitted.

(Petitioner Halina Lustig Exhibit No. 2 was marked for identification and received in evidence.)

By Mr. Richardson:

Q Now, Mrs. Lustig, do you have any records as to your bill with the PG&E, the Pacific Gas & Electric Co.?

A Yes, sir.

Q What do you have there? Does this cover the year 1954?

A Yes, it does.

Q And this runs from January 12 through December 8, does it not, in that year?

A Yes, it does.

MR. RICHARDSON: Do you want to look at this, [Tr. 34] Mr. Lustig?

MR. LUSTIG: It's all right. What is the amount of that?

MR. RICHARDSON: If your Honor please, I offer this as an exhibit.

THE COURT: Admitted.

THE CLERK: Petitioner's Exhibit No. 3.

(Petitioner Halina Lustig Exhibit No. 3 was marked for identification and received in evidence.)

By Mr. Richardson:

Q Mrs. Lustig, let me get back to the rent again. Just a minute. Your receipt was $581.25. As far as the child is concerned, did you attempt to prorate that rent as to what portion of it would be—

A Yes, I did.

Q And what figure did you arrive at on that?

A $215.62.

Q Now, how did you arrive at that figure, if you know, Mrs. Lustig?

A During the first quarter of the year I lived in the apartment alone with the child. The rent at that time was $43.75. I made a total for the quarter and deducted half of the total in the amount of $65.62 for the dependent child. The remaining three-quarters when the apartment was also shared by my mother and when the rent had gone up to $50, [Tr. 35] I totalled it and arrived at the amount of four fifty and deducted a third, the amount of one fifty, for the child.

Q And that gave you a total that you allocated to the child of $215.63; is that correct?

A That is correct.

Q Now, Mrs. Lustig—

MR. LUSTIG: Excuse me. What was the total amount?

MR. RICHARDSON: $215.63.

THE WITNESS: 62 cents.

MR. LUSTIG: What year?

MR. RICHARDSON: For the year 1954, allocable to the child.

By Mr. Richardson:

Q Now, Mrs. Lustig, do you have any idea as to the amount that you expended for the clothes for the child during that year, 1954?

A I have no receipts. I tried to go back to the year and remember it. The child grew rapidly during this time. I had to spend a lot for his clothes, for small items like you need for a child which has to be trained. And I estimated the total amount at $100.

Q At $100 for the entire year?

A For the entire year.

Q And that's your best estimate of what you spent for clothes for the child during that year?

[Tr. 36]

A That is correct.

Q Mrs. Lustig, you had some item of Dy-Dee Wash, I think it is called?

A For the first two months of the year 1954 we had diaper service, which is called Dy-Dee Wash. I have found two check stubs. I totalled them up, and the amount of $14.35. After those two months the service was discontinued.

Q Do you have those check stubs?

A No, sir. I have only my check stubs.

Q I mean that's what I was asking you for. Do you have the stubs?

A It will take me a moment to find them.

MR. RICHARDSON: If your Honor please, it just occurred to me that rather than go through this list and make exhibits of each of these, may I ask Mr. Lustig if he will agree to these?

THE COURT: Certainly.

MR. RICHARDSON: Mr. Lustig, I can show you the list of what Mrs. Lustig has. I would like to ask if you would agree to it.

MR. LUSTIG: Certainly.

MR. RICHARDSON: You would?

MR. LUSTIG: I will have a look at it first.

THE COURT: Let's take a 10-minute recess.

(Short recess.)

[Tr. 37]

MR. RICHARDSON: If your Honor please, during the recess I have showed Mr. Lustig a list of expenses that Mrs. Lustig claims, and he has agreed to several of them.

If I may just state, Mr. Lustig, I understand there is an item for Kaiser Foundation in the amount of $39.

MR. LUSTIG: There is a question mark there. I would like to know if that was all just the child.

MR. RICHARDSON: You have an opportunity, of course, to examine Mrs. Lustig. I mean I want to know now which items you agree to.

MR. LUSTIG: The ones I really did agree to was the PG&E, $8, and the Borden's milk bill.

MR. RICHARDSON: In the amount of $47.56?

MR. LUSTIG: No, no. She includes milk.

MR. RICHARDSON: Tell me which ones you will agree to.

MR. LUSTIG: I agree to the PG&E; I agree to the dry cleaning.

MR. RICHARDSON: That dry cleaning is in the amount of $12?

MR. LUSTIG: That's right. And the vitamins, $12, and an estimated amount of $5.

MR. RICHARDSON: Will you agree to those items?

MR. LUSTIG: I agree. They are too small to argue.

By Mr. Richardson:

[Tr. 38]

Q Mrs. Lustig, did you have medical expenses to the Kaiser Foundation in 1954?

A Yes. I had two different kinds. There was quarterly dues for which I have a receipt in the amount of $39.60 for the year for the child only.

MR. RICHARDSON: Do you want to look at this?

MR. LUSTIG: I agree to this $39.60.

MR. RICHARDSON: I offer this—if he agrees to it it isn't necessary.

THE COURT: You agree to it?

MR. LUSTIG: I agree to it.

MR. RICHARDSON: I don't see any point in including it with the exhibits.

THE COURT: No.

By Mr. Richardson:

Q Did you have other medical expenses?

A I had other medical expenses for which I couldn't get a receipt. Office visits were charged at $1 and home visits at $2. I estimated there was a minimum of ten office and ten home visits, which make it a total of $20.

Q Now, do you recall if, during the year 1954, those office visits and home visits actually took place?

A Yes; at least that many.

Q Now, did you have an expense for milk, Borden's milk, during that year?

[Tr. 39]

A Yes, I did.

Q How much was that?

A $47.56.

Q And did that include milk for yourself also?

A Yes, it does. I don't drink much milk.

Q Do you have any way of saying how much went to the child and how much to you?

A Well, except that I don't drink milk as such, but I might take a little in my coffee twice a day.

Q The child drank milk at that time?

A Of course.

Q Now, there is an item of food, Mrs. Lustig. What did you estimate that you paid for the child's food in 1954?

A The child had at that time a diet of one egg a day, two slices of bacon a day, one banana, one orange; in addition to this, two or three baby cans of fruit and vegetable, one baby can of meat and

cookies and such foods from the general household that were suitable for babies.

Q How much would you estimate it cost you per day for the child's food?

A A dollar a day.

Q One dollar a day during the year 1954?

A Yes.

Q Now, did you have any expenses for launderette and soap?

[Tr. 40]

A A great deal.

Q Do you have any idea of what that is?

A I estimated a very minimum of $1 a month.

Q For the year 1954?

A For the year '54.

Q That would be $12 for that year?

A Yes, sir.

Q Now, did you have any expense for the barber shop; tips?

A Yes, I did. The child went every four weeks and I paid $1.50 for the barber and the barber got a quarter tip.

Q Mrs. Lustig, do you have a total there of the expenses that you have enumerated?

A Yes, I do.

Q What is that total?

A Excuse me just a moment.

Q I am speaking of the ones he has agreed to.

A I have a total of $939.57.

Q And is it your testimony that that amount was expended by you during the year 1954 for the benefit of the child?

A This is the amount exclusive of child care, and this is my testimony; yes.

Q Now, as to child care, Mrs. Lustig, can you tell the Court what the child care consisted of and how much you spent [Tr. 41] in 1954?

A I employed two different girls. In the first quarter I paid $140.50; the second quarter $234; the third quarter $182.20; the fourth quarter $220.50. That is the total amount of wages of $776.20 for which I paid social security, and I have the cancelled checks made out to—

Q Just a minute. What is the amount of the social security that you paid for the baby sitters?

A I didn't total it up. The first quarter it was $7.62; the second quarter $8.68; the third quarter $7.25; the fourth quarter $8.82.

* * * *

[Tr. 44]

By Mr. Richardson:

Q Now, Mrs. Lustig, one more thing. The amounts that you paid for baby sitters, as I understand it, your total is $776.20 in 1954?

A Yes, sir.

Q Were the baby sitters necessary so that you could work?

A That is right.

Q And without the baby sitters could you have held a job and supported yourself?

A I could not.

Q The total amount for baby sitters, I believe you testified, was $776.20?

[Tr. 45]

Q Was there food for the baby sitters, Mrs. Lustig?

A No. I did not include that in here. I included only the social security.

Q What was the food for the baby sitters, Mrs. Lustig, if you know?

A $6 a day.

Q Were there any other expenses that you had in connection with the baby sitters?

A I had baby sitters for extra days, weeks, and evenings, where I went out; but not in order to enable me to hold a job. Is that what you mean?

Q Any expenses that you had in connection with the baby sitters in connection with your working or holding a job.

A No. I had the baby sitters. It was two per cent social security and an estimated food expense for sitters in the amount of $60 a year.

MR. RICHARDSON: I think that's all.

THE COURT: Mr. Lustig, do you want to cross-examine?

MR. LUSTIG: Yes, your Honor.

Pardon me, please, Mr. Richardson. May I ask you for the item marked expense, which I did not have?

CROSS-EXAMINATION

By Mr. Lustig:

[Tr. 46]

Q Mrs. Lustig, you stated here that Dy-Dee Wash you paid during the year '54 at two months, two check stubs which have $14.35?

A That is right.

Q Since you paid them in '54 is it possible that one of those checks was for December 1953 that you paid in '54?

A That could be; that could be, but I—

MR. LUSTIG: It will just take about—if it is agreeable with Mr. Richardson, $7 we could take off; a difference of $7.20.

THE COURT: Let Mrs. Lustig check.

A It was paid on the 18th of January, and the

amount was $7.35. I think about half of it should be deducted then.

By Mr. Lustig:

Q I believe you have made two payments. The second payment was in February for the month of January, and the $7.35 would all be the December bill?

A No. It went from the middle of the month to the middle of the month.

Q Do you have any bill from Dy-Dee to that effect?

A I am sorry, your Honor. It takes me some time to find it now.

MR. LUSTIG: Will your position—would it be agreeable we take $7.35 for December?

MR. RICHARDSON: No, sir. I will take whatever [Tr. 47] she says. I don't want to pick a figure out of thin air.

MR. LUSTIG: In other words, the $14.35, I will go along with you on this case. We will take about $3.50 for December '53 and the rest for '54.

THE COURT: Let's let Mrs. Lustig testify Mr. Lustig. You don't know what it is. You are surmising.

MR. LUSTIG: Sorry.

THE WITNESS: I added my expenses which I paid during the year 1954, and also there must have been in 1955 some expenses for the last month in 1954 which entered into it; so that I don't see that there is an error occurring.

By Mr. Lustig:

Q You say you discontinued Dy-Dee Service in February of '54?

A That's true. But I paid it in January.

Q In other words, for February; is that it? Well, anyhow I just want to bring out the point. I don't think $7 is worthwhile arguing about, or $3, or whatever it would amount to.

Mrs. Lustig, is it correct that up to June, I believe it was, of '55 I did have visiting rights at your residence for the child about three times a week?

A That is correct.

Q And in other words, that up to June '55, during the year of 1954, I saw the child about two or three times a week?

[Tr. 48]

A That is correct.

Q And that I very often gave the child his bath and put him to bed?

MR. RICHARDSON: If your Honor please, I submit this is irrelevant.

MR. LUSTIG: I will connect it, your Honor; I will connect it.

* * * *

[Tr. 56]

By Mr. Lustig:

Q You say you have your laundry soap, $12 a year. Do you have any receipt for that?

A Launderette and soap.

Q Launderette and soap estimated $12 a year. That's a lot of soap, $12 a year.

A I didn't keep my stub every time I bought a box of soap flakes.

THE COURT: Does that mean that that $12 was all for soap? I didn't so understand it.

THE WITNESS: Well, I don't have a washing-machine, your Honor. It means I take my linen to the laundromat, where I pay 65 cents a week for the washing.

THE COURE: So it is not all for soap?

THE WITNESS: In addition to that, when I was at home I used soap.

By Mr. Lustig:

Q In other words, the point I want to make is the launderette was just for the child's clothes?

A This is what I—

Q Or your own, too?

A I am estimating this as what I used for the child.

[Tr. 57]

Q Now, the barber shop, $21 a year. Do you recall that on several occasions I took the child myself to the barber?

A No, I don't recall that.

Q If I would bring the barber in and say that I had the child there, would you believe that the barber is lying?

A In '54 I don't believe you did.

Q If I did, would you say the barber is wrong? Is that it? He didn't see the child in his place?

THE COURT: You don't have to answer that question.

MR. LUSTIG: All right. It is just a few dollars involved, which I will include in my pleadings—in my argument.

By Mr. Lustig:

Q The vitamins is all right. Now, there is one thing which we have, the food expense. Do you recall that during 1954, at that time when you told me that you needed the money to take the child to go on a vacation and take the child along, that you said to me that the food costs—excuse me—that the food costs about $10 a month?

A I cannot recall that.

* * * *

[Tr. 59]

By Mr. Lustig:

Q You stated before that the food the child ate was about one can of meat a day and about two or three cans of vegetables or fruit?

A In the beginning of the year, that is right. And later he ate steak, chicken.

Q Whatever you ate you shared with him; is that right?

A Well, I would say that I went out of my way to feed the child, which was not well, and I ate what I bought for him.

Q And you don't think that in view of your statement to me, which you say you do not recall, but you do not deny, that you spent only $10 a month on food for the child; that you are up to $30 a month?

Let's put it another way. Is it correct I had the child with me during three weekends in '54?

A I believe that is right.

Q That is correct. That I had the child with me on so many weekend days and, as I stated before, about 40 weekend days?

A Yes; except that you only gave the child usually one meal, which was lunch.

[Tr. 60]

Q That is correct; that is correct. I would have brought out the same point. In other words, I had him with me on three-day weekends and had 24 meals. I had him with me about 40 weekends and I have here—I have a computation of 43 meals for those 40 days, a total of 67 meals computed out of 22 days that I fed the child during the year. Will you say that it would be correct?

A That could be.

Q And during the year you were—you took the

child to visit the house of one Mrs. Epstein in San Rafael for—was it a week or two?

A Yes.

Q Two weeks?

A Two weeks.

Q Two weeks. Did you pay Mrs. Epstein for the food that the child consumed?

A Do I have to answer this, your Honor?

THE COURT: Yes. I think it is relevant.

A I did not pay it in cash. I took the child—

By Mr. Lustig:

Q Thank you. That's all I want to know.

A May I finish?

THE COURT: Let the witness finish.

A I took the child out. He woke up every morning at 6:00. We went to a restaurant and we had our breakfast there [Tr. 61] because the rest of the family did not wake up until 9:00. And later during the year when my financial circumstances were a little bit easier, I saw to it that my friend was suitably reimbursed for expenses, but not in cash, which would not have been acceptable to her.

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No. 16416

United States Court of Appeals

For the Ninth Circuit

AUDY W. DEERE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division.

APPELLANT'S BRIEF.

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United States Court of Appeals
For the Ninth Circuit

AUDY W. DEERE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the District Court for the District of Alaska, Fourth Division.

APPELLANT'S BRIEF.

STATEMENT OF FACTS.

Appellant was convicted of violating Section 50-5-3 of the Alaska Compiled Laws Annotated 1949 (operating a motor vehicle while under the influence of liquor).

Appellant was sentenced February 26, 1959, and an order and judgment, incorporating all of the proceedings had in the case, was duly entered March 3, 1959.

Appellant, prior to the taking of any testimony (other than of one witness), moved to challenge the jurisdiction of the Court on the ground that the Court in its present status can take no cognizance of any Territorial offense (T.R. pp. 2-4).

After the conclusion of the testimony and after the verdict, the appellant renewed the motion, basing his objection to the jurisdiction on the grounds originally urged at the opening of the trial (T.R. p. 5).

I.

THE COURT LACKED JURISDICTION TO ENTERTAIN ANY PHASE OF THE PROCEEDINGS.

Congress established a District Court for the District of Alaska with general jurisdiction in civil and criminal proceedings and the establishment of such Court was strictly incidental to the territorial status.

The judges appointed to preside over these Courts hold their respective offices for the term of four years and until their successors are appointed and qualified.

The functioning Courts in Alaska are thus legislative in character, established under Article IV, Section 3 of the United States Constitution, and are distinguished from the Constitutional Courts under Article III, Section 1 of the United States Constitution (see *McAllister v. U. S.,* 141 U.S. 174).

After many years of petitioning Congress, Alaska was admitted to Statehood on July 7, 1958, pursuant to a Statehood Act, passed by Congress.

Prior to admission Alaska duly convened a Constitutional Convention and passed and adopted an Alaska Constitution.

Unlike Hawaii, Alaska during its territorial status did not create or organize any territorial Court system, depending solely on the Court system functioning at the time of Alaska's admission into the Union.

The District Court in Alaska, as pointed out in the *McAllister* case, has dual jurisdiction, that is, to administer the Federal laws and also the right to administer the Territorial statutes. We are confining our argument solely to the right of the Court to administer the Territorial acts since the admission of Alaska as a State.

This distinction between Constitutional and Legislative Courts was first established in *American Insurance Company v. Cante,* 26 U.S. 511 (1828). In said case, the United States Supreme Court, Chief Justice Marshall, in discussing the jurisdiction of the Territorial Courts in Florida, stated at 26 U.S. 545:

> ". . . The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not Constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are Legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d Article of the Constitution, but is conferred by Congress, in the execution of those general powers which that

body possesses over the territories of the United States."

Thereafter, in the leading case, the United States Supreme Court in *Brenner v. Porter,* 50 U.S. 235, Justice Nelson writing the opinion, held that the Superior Court for the Southern District of the Territory of Florida could not constitutionally exercise admiralty jurisdiction after the admission of Florida into the Union of States. The basis of the decision is that under Section 2, Article III of the United States Constitution, "the judicial power shall extend . . . to all Cases of Admiralty and Maritime jurisdiction . . .". Section 1 of the same Article provides:

> "Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and in such Inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, *shall hold their Offices during good behaviour . . .*" (Emphasis supplied).

Inasmuch as the judges of the Superior Court for the Southern District of the Territory of Florida did not "hold their offices during good behaviour", but acted under a shorter tenure, that Court was incapable of exercising "the judicial power of the United States" over "all cases of Admiralty and Maritime jurisdiction". The power of Congress to confer such Admiralty jurisdiction on Legislative Courts under Article IV, Section 3, second paragraph (pertaining to territories) had terminated when Florida became a State. Thus the Supreme Court stated at pages

243 and 244 of Volume 50 of the United States Reports:

> "The admission of the State into the Union brought the Territory under the full and complete operation of the Federal Constitution, and the judicial power of the Union could be exercised only in conformity to the provisions of that instrument. By Art. 3, §1, 'The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may, from time to time, ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their offices during good behaviour.'
>
> *Congress must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but the Judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution.* The Territorial courts, therefore, were not courts in which the judicial power conferred by the Constitution on the Federal Government could be deposited. They were incapable of receiving it, as the tenure of the incumbents was but for four years. (1 Peters, 546.) Neither were they organized by Congress under the Constitution, as they were invested with powers and jurisdiction which that body were incapable of conferring upon a court within the limits of a State." (Emphasis supplied.)

At page 245, Justice Nelson further stated as follows:

> "We have chosen to place the decision upon the effect of the admission of the State with a government already organized under her constitution, and prepared to go into immediate operation, because such is the case presented on the record; but we do not thereby intend to imply or admit that a different conclusion would have been reached if it had been otherwise, and the State had come into the Union with nothing but her organic law, leaving the organization of her government under it to a future period."

A great deal of argument in the discussion of jurisdiction is laid on the proviso under the Alaska Constitution, Article 15, Section 2:

> "Section 2. *Saving of existing rights and liabilities.* Except as otherwise provided in this constitution, all rights, titles, actions, suits, contracts, and liabilities and all civil, criminal, or administrative proceedings shall continue unaffected by the change from territorial to state government, and the State shall be the legal successor to the Territory in these matters."

It is the contention of counsel that since the Court has completely lost its jurisdiction with the ascendency of Statehood, that such jurisdiction can in no manner be divisible and that realistically speaking there is no Court to which jurisdiction can attach and that saving existing rights as attempted by Section 2 of the Alaska Constitution cannot be construed as a power to "create, ordain or establish" within the meaning of the constitutional provisions. That can only be accomplished by the Alaskan Legislature

deriving its right under the Judiciary Act of the Constitution as adopted by the Alaska voters and accomplished in futuro.

It is further interesting to note that the reason for the transitory existence of the Legislative District Courts is due to the transitory status of the Territory itself. The constant reference to an interim Court as an expedient method to fill in the hiatus is a nebulous thought. The historic development and growth of the country shows that territories upon attaining a stature of recognition join the other states and with the elimination of the Territorial status the jurisdictional system, solely dependent upon and incident to its existence, must of necessity lose its jurisdictional effect.

Procedurally, an appeal from any verdict founded on a Territorial statute could only lie to another judicial form provided under a new judicial structure as evolved in the Alaskan Constitution and, in the absence of such judicial forum, the defendant is bereft of his right to appeal.

CONCLUSION.

Appellant respectfully submits that the Legislative Courts of Alaska, incorporating the dual function of administering the Federal statutes as well as the Territorial statutes, have lost their function with the gaining of Statehood and that there is no authority for the Court to administer any of the Territorial laws since only a Court properly established and or-

dained to administer such laws by the Alaskan Constitution and having an appellate branch to enable a defendant the right of appeal, can exercise proper jurisdiction.

WARREN WM. TAYLOR,
FRED D. CRANE,
By FRED D. CRANE,
Attorneys for Appellant.

IN THE

United States Court of Appeals

For the Ninth Circuit

LEONARD WESLEY PARKER,	*Petitioner,*	Undocketed
vs.		
HONORABLE J. L. MCCARREY, JR., DISTRICT JUDGE OF THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, THIRD DIVISION,	*Respondent.*	

On Motion for Leave to File Petition for Writs of Prohibition and Mandamus and on Petition for Writs of Prohibition and Mandamus

AUDY W. DEERE,	*Appellant,*	16416 No. ~~16,146~~
vs.		
UNITED STATES OF AMERICA,	*Appellee.*	

On Appeal from the District Court for the District of Alaska, Fourth Division

KURTIS KAY KOSTERS,	*Appellant,*	Undocketed
vs.		
UNITED STATES OF AMERICA,	*Appellee.*	

On Appeal from the District Court for the District of Alaska, Fourth Division

BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF ALASKA AS AMICUS CURIAE

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IN THE

United States Court of Appeals

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On Appeal from the District Court for the District of Alaska, Fourth Division

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BRIEF FOR THE ATTORNEY GENERAL OF THE STATE OF ALASKA AS AMICUS CURIAE

JURISDICTION.

The State of Alaska hereby enters this matter as *amicus curiae* pursuant to Rule 18-9(c) and (d) of the

Rules of the United States Court of Appeals for the Ninth Circuit. The scope of this brief will be limited to aiding this court in the question of its jurisdiction over cases arising in the United States District Court for the Territory of Alaska. The question of the jurisdiction of the United States District Court for the Territory of Alaska will also be considered. The merits of the cases will not be considered.

SUMMARY OF ARGUMENT.

Congress under its authority to admit states into the Union has provided for the continuation of the operation and functioning of the court generally known as the District Court for the Territory of Alaska and also, supervision by appellate review and otherwise of this court by the Court of Appeals for the Ninth Circuit. The arrangement is necessary as a transitional measure involved in the passing of Alaska from territorial status to statehood. The arrangement has been consented to by the State of Alaska and is the only feasible and reasonable method by which to provide for the transitional period so as to prevent an interregnum or hiatus in the operation of the judiciary of not only the state government, but also of the United States.

Section 18 of the Statehood Act suspends the operation of §§ 12 through 17 and provides that the district court shall function as heretofore. Although this section clearly purports to suspend preceding sections of the Act, insofar as they pertain to the operation of

the lower court, the question of whether or not it deprives the Court of Appeals for the Ninth Circuit of jurisdiction is a matter of statutory construction. Any possible ambiguity which may result from the reading of § 18 of the Statehood Act out of context is resolved by considering § 1 of the same Act which ratifies the provisions of the Constitution of the State of Alaska, and therefore, the transitional measures in the Alaska Constitution which provide that the *"judicial system"* shall continue as on the date of admission. The court of appeals is an integral and necessary part of that *judicial system.*

It is unreasonable to assume that the Congress of the United States would have destroyed the jurisdiction of the court of appeals without express mention and detailed provision for the preservation of some other appellate review. Although this arrangement for appellate review may be unique historically, it is explained by the equally unique historical fact that Alaska as a Territory, and Alaska alone as a Territory, was deprived of any territorial judicial system and was therefore left at the date of statehood without any provision or system whatsoever.

Under the Constitution of the United States, Congress may make all necessary and proper laws for carrying into effect the express power to admit states into the Union. Although the courts existing in the Territory of Alaska were authorized under the provisions of the United States Constitution pertaining to the authority to provide for the government of territories, and were thus legislative courts, the courts

and the judicial system can continue under the equally potent constitutional authorization to admit states.

This judicial system, if it were imposed upon the State of Alaska without its consent, would clearly be an invasion of the right of the State of Alaska to be admitted into the Union on an equal footing with all other states. However, there can be no objection to this arrangement since it is with the full consent of the State, is a part of its organic law, and instead of being an imposition upon the State is, in fact, a beneficial arrangement in the best interest of the State and its people.

Although the jurisdiction of the lower court can be sustained as being either a legislative court of the United States, or, as a state court to which federal jurisdiction has been delegated, the State favors the first interpretation.

With full recognition of the right of the Court to review this arrangement, it is respectfully submitted that the same is largely political and in essence is the union of two sovereigns entering into a mutually desirable pact which contemplates at an early date the usual relationship in all respects which exists between the United States of America and the other states of the Union. This pact, which the people of Alaska consented to through their constitutional convention, their ratification of the Constitution by popular vote, their consent to the Enabling Act by popular vote, and their continued consent as expressed by their elected representatives in their State Legislature, should be most seriously considered and upheld if at all possible by this court.

ARGUMENT.

I.

THE ACT OF ADMISSION CONTINUES APPELLATE JURISDICTION AS HERETOFORE.

A. Section 18 of the Enabling Act suspends the operation of §§ 12 through 17 of the Act and provides that the district court shall function as heretofore.

Initially, it becomes necessary to determine the statutory basis for this court's appellate jurisdiction. Heretofore that statutory authority rested, without serious question, primarily upon §§ 1291, 1292 and 1294 of Title 28 of the United States Code, which provided for review of final and interlocutory decisions of the territorial courts by this court. Public Law 85-508, 72 Stat. 339 (hereinafter referred to as the Enabling Act) repealed these provisions by § 12(e) thereof.

However, § 18 of the Enabling Act provides that the provisions of the preceding sections relating to the "termination of jurisdiction of the District Court for the Territory of Alaska, the continuation of suits, the succession of courts, and the satisfaction of rights of litigants in suits before such courts shall not be effective" for up to three years. The section further states that during that period the territorial court "shall continue to function as heretofore." The State agrees with the Federal Government that the District Court for the Territory of Alaska continues to have jurisdiction over state and federal matters. However, the State does not agree that appellate jurisdiction of this court falls with respect to the District Court for the Territory of Alaska for lack of

statutory provision for its continuing appellate jurisdiction.

Heretofore the District Court for the District of Alaska has been subject to not only appellate review but has also been subject to a continuing supervisory control by the Court of Appeals for the Ninth Circuit. Section 41 of Title 28, U.S.C.A., places Alaska within the Ninth Judicial Circuit of the United States. The district court has been superintended by the Judicial Council of the Ninth Circuit established pursuant to the provisions of §§ 332 and 333 of Title 28, U.S.C.A. Under the last paragraph of 28 U.S.C.A., § 332:

> "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

the Court of Appeals has not hesitated to intervene in the business of the courts below where necessity has so demanded. Thus in *Pennywell v. McCarrey,* 255 F.2d 735 (C.A. 9th, 1958), this court utilized the extraordinary writs in a case where the district court had issued a void bench warrant for an arrest to compel payment of a fine the petitioner had already paid. This court has always utilized its appellate jurisdiction to enforce the implementation of its mandates.

If the judicial system existing on January 3, 1959, has been stripped of all provisions for appeals and for continuing appellate supervision, the status quo

has not been continued. The district court will not function "as heretofore" and a radically new judicial system will have been created. The intent of § 18 is clear. The entire judicial system including the appellate jurisdiction of the Court of Appeals for the Ninth Circuit is to continue "as heretofore." No startling innovation with respect to appeals was intended.

B. Any possible ambiguity in § 18 of the Enabling Act regarding continuing appellate jurisdiction is resolved upon analysis of that section considered in the context of the Enabling Act.

1. Congress, by accepting, ratifying and confirming provisions of the Constitution for the State of Alaska concerning the continuance of "the judicial system," resolved any ambiguity in § 18 of the Enabling Act and showed an intent to continue appellate jurisdiction as heretofore.

There may be some ambiguity in § 18 of the Statehood Act when it is read out of context. Do the provisions for the "continuation of suits" and "succession of courts" refer to a continuance of the status quo with respect to both courts of original jurisdiction and appellate courts? Or do these provisions, as the Federal Government urges, refer only to a partial continuance of the status quo, that is, a continuance of the jurisdiction of the district court only? Examination of the remaining portions of the Enabling Act clearly reveals an intent on the part of Congress to continue the status quo with respect to all of the courts which have heretofore passed on Alaska cases.

Thus at the end of § 1 of the Enabling Act (P.L. 85-508, 72 Stat. 339), the following appears:

> ". . . the constitution formed pursuant to the provisions of the Act of the Territorial Legislature of Alaska . . . and adopted by a vote of the people of Alaska in the election held on April 24, 1956, is hereby found *to be republican in form and in conformity with the Constitution of the United States* and the principles of the Declaration of Independence, *and is hereby accepted, ratified and confirmed.*" (Emphasis added.)

What was accepted, ratified and confirmed by Congress with respect to a judicial system for Alaska? A review of Art. IV, § 1 and Art. XV, § 17 of the Constitution of the State of Alaska ratified by the Federal Government conclusively shows a federal and state intent to continue the status quo of the whole judicial system as constituted on January 3, 1959, for the transition period.

Article IV, § 1 of the Alaska Constitution as accepted by Congress provides in part:

> ". . . The courts shall constitute a unified judicial system for operation and administration. . . ."

The other sections of Art. IV make provision for a family of courts, a complete judicial system, including superior courts and a supreme court.

Article XV, § 17 of the Constitution of the State of Alaska provides:

> "Until the courts provided for in Article IV are organized, the courts, their jurisdiction, *and the judicial system shall remain as constituted on the date of admission* unless otherwise pro-

> vided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law." (Emphasis added.)

The Enabling Act, by adopting the judicial system existing on the date of admission, adopted the entire judicial system including the court of original jurisdiction and the court of appeals. There is no evidence anywhere in the Enabling Act or elsewhere that Congress intended to accept only part of the Alaska constitutional plan for the continuance of the status quo with respect to the judicial system.

This is not the only instance in which Congress has given an existing Alaskan law the effect of a federal statute. In *Ketchikan Packing Company, et al. v. Fred A. Seaton, Secretary of the Interior, et al.,* decided by the United States Court of Appeals for the District of Columbia Circuit, Case No. 15075, filed May 14, 1959, the court sustained an interpretation of the Enabling Act by the Secretary of the Interior where Ordinance No. 3 abolishing fish traps, adopted by the people of Alaska along with the Constitution, was deemed to have been incorporated by Congress into the Enabling Act since that Act "accepted, ratified and confirmed" the Alaska Constitution. That opinion in pertinent part states:

"PER CURIAM: Appellants attack the validity of an order of the Secretary of the Interior dated March 7, 1959, 24 Fed. Reg. 2053-71, which has the effect of prohibiting the use of fish traps in Alaskan waters effective April 18, 1959. The order recites its authority as being Section 1 of the White Act, and before this court the Secretary argued that the White Act has been so amended by Section 6(e) of the Alaska Statehood Act as to compel him to order the prohibition. In promulgating the order, the Secretary says he merely complied with a statutory duty imposed by Congress.

"The so-called Westland proviso contained in Section 6(e) of the Statehood Act reads:

> '(T)he administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government *under existing laws* until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources *in the broad national interest*. . . .' (italics theirs)

On January 3, 1959, simultaneously with the effective date of the Statehood Act, the Constitution of the State of Alaska became effective and with it three ordinances adopted by the people of Alaska along with the Constitution. Ordinance No. 3 provides: . . . (My note: for prohibition of fish traps in all the coastal waters of the state)

> The Secretary read the words 'under existing laws' in the Westland proviso as including Ordinance No. 3 of Alaska, and concluded that the Statehood Act which 'accepted, ratified and confirmed' the Alaska Constitution, amended the White Act by prohibiting the use of such traps in Alaskan waters as set forth in the ordinance. In other words, the Secretary argues that the Congress did not intend that he should suspend the Alaskan ordinance, adopted by popular vote along with the Constitution, in the interim period while he administered the state's wildlife resources."
>
> * * * * * * *
>
> ". . . In such a situation, while the Secretary's interpretation of the powers conferred upon him by Congress is not binding on the courts nevertheless it is entitled to considerable weight. In this instance his interpretation is reasonable, and it is consistent with the congressional plan for interim administration of natural resources described in the Westland proviso. We think his view should be sustained.
>
> "Of necessity, in this unique interim situation, the Secretary must apply a federal sanction to effect the enforcement of a state law. . . ."

A copy of this opinion is attached as Appendix A.

The Federal Government states that it would be strange if Congress had intended that the jurisdiction of this court should be continued without specific mention of such continuing jurisdiction. The converse is true. It would have been remarkable if destruction

of the entire system of appellate review were contemplated without specific mention. Congress intended to continue the status quo for the transition period. Congress could have been expected to mention any radical changes or departure from the judicial system as it existed on the date of admission. Withdrawal of appellate jurisdiction and of appellate supervision as a part of that judicial system would have been such an extreme change in the existing judicial system as to demand specific and detailed mention. Provision for the continuance of the status quo on the other hand requires no detailed statement. As the Federal Government points out, "Congress was not oblivious of the distinction between the two classes of cases which would arise during the transitional period." It would have been just as extraordinary to remove appellate jurisdiction over cases of a state nature as over cases of a federal nature. If there were no continuation of the status quo, there would have been *no* courts in Alaska during the transition period. If no provision had been made for the continuation of the *whole* judicial system, there would be *no* appeals from and *no* appellate supervision over any transition courts of original jurisdiction carried over. Failure to provide for continuing appellate jurisdiction over cases of both a federal and a state nature would have been "such a novel and extraordinary departure from all precedent (as) would hardly have been signified by Congressional silence." Fortunately, Congress has expressed itself on this by adopting a whole judicial system as contemplated by the Constitution for the State of Alaska.

2. Under § 18 of the Enabling Act, litigants are entitled to a continuance of the status quo with respect to the satisfaction of their rights before the district court, this including the right to appeal and continuation of appellate supervision "as heretofore."

Conceding for the sake of argument that the language of § 18 of the Enabling Act regarding "the continuation of suits, the succession of courts," is ambiguous, the same cannot be said of the provisions for "the satisfaction of rights of litigants in suits before such courts." Would such litigants have the same continuing rights as litigants if they did not have the right to appeal certain interlocutory or final orders? For example, suppose the National Labor Relations Board should petition the District Court for the Territory of Alaska for injunctive relief under the provisions of § 160(e) of Title 29, U.S.C., for the enforcement of an order to prevent an unfair labor practice and that the district court hears that petition even though the Court of Appeals for the Ninth Circuit is not then in vacation. Section 160(e) of Title 29, U.S.C., provides that a United States District Court shall have power to issue such an order and to provide for temporary relief only when the Court of Appeals for the circuit is in vacation. Would the Court of Appeals in such case be powerless to prevent such usurpation of its authority? Would the rights of the litigant remain the same if he could not petition this court for a writ of prohibition? The answer is no.

3. If no statutory authority can be found for continuation of appellate jurisdiction over appeals in cases decided after statehood, then no present statutory authority can be found over appeals in cases decided before statehood.

The Federal Government states that there is no specific authority in § 18 of the Enabling Act for continuing appellate jurisdiction in this court and, therefore, this court has no authority to hear cases appealed from the District Court for the Territory of Alaska. This argument, when followed to its logical conclusion, leads to an absurdity. If authority cannot be found for continuing appellate jurisdiction over cases decided in the transition court, where can continuing appellate authority be found over cases decided in the District Court for the Territory of Alaska before January 3, 1959?

Congress must expressly provide for the disposition of territorial cases pending in the constitutional appellate courts of the United States on the date of statehood. *Freeborn v. Smith,* 2 Wall. 160 (1865), 17 L. ed. 922. The Attorney General of the United States has taken the position that the appellate jurisdiction of this court under 28 U.S.C., §§ 1291 and 1292, with the respect to the District Court for the Territory of Alaska is abrogated either by § 12(e) of the Enabling Act or by the very act of admitting Alaska as a State. Further, all parties herein, including the Attorney General of the United States, concur that §§ 13 through 17 are suspended by § 18.

The authority for exercising jurisdiction over these cases must rest either upon §§ 1291 and 1292 of Title 28, U.S.C., or upon § 14 of the Enabling Act, which

provides for the disposition of pending cases. The Government's argument inevitably leads to the conclusion that as far as the District Court for the Territory of Alaska is concerned, §§ 1291 and 1292 of Title 28, U.S.C., are either repealed or abrogated; that §§ 13 through 17 of the Enabling Act are suspended; that under the rule of *Freeborn v. Smith, supra,* cases pending at the time of admission in nonterritorial courts cannot be heard without other statutory provision for their disposition; that no such authority may be found in § 18 of the Enabling Act; and, consequently, all cases pending on January 3, 1959, in this court or in the Supreme Court cannot, of necessity, be heard under the laws as they now exist.

This is subject to one qualification. Under the Government's analysis, this odd result would follow: Only when the District Court for the Territory of Alaska ceases to exist, will this court be authorized to hear appeals of cases decided by the District Court for the Territory of Alaska before January 3, 1959. At that time, according to the Government, §§ 13 and 14 of the Enabling Act will spring into effect and the court will then have specific statutory authority for hearing appeals from the old prestatehood territorial court.

Can an intent to kill or suspend all appeals on these cases be imputed to Congress? Congress has not been disposed to act so harshly in the past. Once before Congress failed to make provision for such cases, but upon discovering the error, immediately rectified it. See *Freeborn v. Smith, supra.* The Gov-

ernment's argument is inconsistent with § 13 of the Enabling Act, which shows the congressional intent at the outset by providing that no case pending in an appellate court shall abate.

This court has heard argument on more than one such case since the date of admission, and the Supreme Court has issued an opinion on at least one such case since January 3, 1959. See *Territory of Alaska v. American Can, et al.,* Docket No. 40, ... U.S. ..... (1959), recently remanded to this court.

At this point, it will or has occurred to the reader that perhaps some sections or portions of §§ 13 through 17 do not relate "to the termination of the jurisdiction of the District Court for the Territory of Alaska." A brief review of § 13 shows that it presupposes the creation and existence of state courts and of a United States District Court for the District of Alaska. Section 13 is clearly suspended in its operation. Section 14 makes provision for, among other things, remand of cases from this court to either (1) the State Supreme Court or other final appellate court of the State or (2) *the United States District Court for said district.* Section 14 is also suspended since this court will not be able to make such remands until the District Court for the Territory of Alaska ceases to exist. There can be no question that §§ 15, 16 and 17 are clearly prospective in operation.

The Federal Government's interpretation of § 18 is unreasonable and is totally inconsistent with the solicitude Congress has shown in providing Alaska with an orderly transition of courts.

4. Section 12 is technical "clean-up" legislation and is not intended to have any substantive effect on the succession of courts.

Section 12, in deleting the words "the District Court for the Territory of Alaska" in §§ 1291 and 1292 of Title 28, U.S.C., destroys the statutory provision upon which this court's appellate jurisdiction rests. However, §12 either (1) is suspended by § 18 or (2) is merely technical clean-up legislation.

It seems certain that Congress did not intend that §12 should have immediate effect. Section 460 of Title 28, U.S.C., makes the provisions of §§ 452-459 of Title 28, U.S.C., applicable to the District Court for the Territory of Alaska and certain other courts. Section 12(e) of the Enabling Act strikes the District Court for the Territory of Alaska from § 460 of Title 28. If § 12(e) of the Enabling Act is immediately effective, then that court and its judges are not subject to the provisions of §§ 452-460 of Title 28, U.S.C. Accordingly:

(1) That court is not necessarily always open, 28 U.S.C. § 452.

(2) Judges of that court need not take oaths, 28 U.S.C. § 453.

(3) Judges may practice law, 28 U.S.C. § 454.

(4) Judges need not disqualify themselves if biased, 28 U.S.C. § 455.

(5) Judges are not entitled to traveling expenses, 28 U.S.C. § 456.

(6) No provision is made for keeping of records, 28 U.S.C. § 457.

(7) Relatives of judges are eligible to appointment to an office or duty in such court, 28 U.S.C. § 458.

Many of the other amendments of the United States Code made by § 12 would create similar results if § 12 is immediately effective. For example, § 12(p) removes the words "and the District Court for the Territory of Alaska" from § 2201 of Title 28, U.S.C. It is this section which gives the District Court for the Territory of Alaska the power to issue declaratory judgments.

Section 12 makes sense if it is suspended in its entirety by § 18 for the same period of time that §§ 13 through 17 are delayed. If § 12 and, in particular, if § 12(e) becomes effective immediately, absurd results follow.

In House Report 624, 85th Congress, First Session, under Sectional Analysis, § 12 is described as merely making "a number of necessary technical amendments." It is §§ 13 through 17 which actually destroy the jurisdiction of this court over appeals from Alaska when the same become effective. Section 13 saves jurisdiction over pending appeals and limits the right of appellate review by this court to cases which arose prior to admission of Alaska and which are prosecuted in the newly-created Federal District Court. Section 12 is nothing more than the technical amending legislation which is to coincide with the actual implementation of the separation of courts into the constitutional dual system of state and federal courts. It is important to note the distinction between § 12 and §§ 13 through 17 because the latter sections spell out

the intent of Congress with care and precision. Sections 13 through 17 can stand without §12 (at least as to the pertinent question of the court's jurisdiction) and would give the exact duality of court systems found in every other state, which is the *ultimate* goal of Congress.

The intent of Congress was to suspend the operation of §§ 13 through 17 in their entirety by § 18. In so doing, the actual provisions which operate adversely upon this court's jurisdiction will not be effective for up to three years. In describing §§ 13 through 17, the House report, *supra,* states that the functions of such sections are to provide for a "continuation of suits, the succession of courts, the saving of rights of litigants in the courts." Note that this is exactly what § 18 suspends, to wit: continuation, succession and satisfaction of the rights of litigants. Since these sections constitute the actual destruction of this court's jurisdiction and since the intent of Congress is thus clearly to suspend their effectiveness, this court's jurisdiction continues until they become effective, notwithstanding the technical clean-up legislation contained in § 12.

C. It would be unjust to leave only the United States Supreme Court as the court of appeals since review by that Court is limited primarily to the discretionary issuance of a writ of certiorari.

Although there is no constitutional right to an appellate review,[1] immediate withdrawal of appellate

[1]See *Reetz v. Michigan,* 188 U.S. 505, 508, 47 L. ed. 563, 23 S. Ct. 390 (1903); *McKane v. Durston,* 153 U.S. 684, 14 S. Ct. 913, 38 L. ed. 867 (1894).

jurisdiction is so drastic an innovation in Alaska, with respect to both state and federal matters, that it is inconceivable Congress would effectuate such a result without making detailed provision for such a result.

There may well be a danger in denying a right of appeal to litigants in cases involving the "judicial power" vested by Art. III of the United States Constitution. Only in Alaska would litigants in cases of federal jurisdiction be deprived of a right of intermediate review. While Congress is not bound by the equal-protection clause of the Fourteenth Amendment, discrimination may be so arbitrary in such a situation mentioned above as to be a denial of due process guaranteed by the Fifth Amendment. For an example of a denial of due process pronounced by the Supreme Court in this very area, see *Griffin v. People of the State of Illinois,* 351 U.S. 12, 76 S. Ct. 585, 100 L. ed. 891 (1956). There the court held that where appellate review is afforded, any such review may not operate in a manner as to deprive those who are financially unable to pay the cost therefor of the privilege. Should this court hold that no appeal is permissible, then the citizens of Alaska would be denied that appeal afforded litigants in all other states. Such a discrimination, on a geographical basis, against parties who are litigants in Alaska courts would be as unjustifiable as the discrimination in the *Griffin* case.

To hold that Congress has deprived this court of appellate jurisdiction over all matters, including federal cases, coming from Alaska, attributes to Con-

gress an intent to make an unconscionable tear in the federal appellate framework. Only the Supreme Court of the United States could give remedy to erroneous decisions, and such relief would then be extended primarily only when a case involving a substantial question could draw the discretionary grant of certiorari.

II.

AS LONG AS THERE IS A FEDERAL DISTRICT COURT IN ALASKA, WHATEVER BE ITS TITLE, THE COURT OF APPEALS FOR THE NINTH CIRCUIT WILL HAVE JURISDICTION OVER IT UNDER SECTIONS 1291, 1292, AND 1294 OF TITLE 28, U.S.C.A., ABSENT STATUTORY AUTHORITY TO THE CONTRARY.

Even if statutory authority for continuing jurisdiction in the Ninth Court of Appeals cannot be found under § 18 of the Enabling Act there is specific statutory authority for that court to continue to hear appeals from the District Court for the Territory of Alaska. Assume that § 12 comes into operation immediately.

Section 1291 of 28 U.S.C.A. after amendment by § 12 would read:

> "*Final Decisions of the District Courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the *district courts of the United States, . . .*"

The term "District Court for the Territory of Alaska" appearing in § 1291, Title 28 U.S.C.A. should be deemed to be synonymous with the "United States District Court for the District of Alaska" for the pur-

poses of that section in the absence of evidence of a contrary legislative intent.[2] Labels should not be determinative. *Juneau Spruce Corp. v. International Longshoremen's Union,* 12 Alaska 260, 265; 83 F. Supp. 224, 226 (1949) is perhaps the leading case on this. The issue there was whether the National Labor Relations Board could petition the "District Court for the District of Alaska" under the following statutory authorization:

> "The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business . . ."

The court stated:

> "Under the construction urged by the defendants the Board would be deprived of any forum in which to enforce its orders, so far as the Territory of Alaska is concerned, if the Court of Appeals for the 9th Circuit were in vacation. . . .

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[2]See *United States of America v. Frank Marrone; United States of America v. Truman Emberg,* consolidated, Criminal Nos. 4033 and 4031, Alaska, Third Division, opinion dated April 9, 1959. See also cases *contra* cited in said opinion: *Reese v. Fultz,* 13 Alaska 227, 96 F. Supp. 449 (1951); *United States v. Bell,* 14 Alaska 142, 108 F. Supp. 777 (1952); *International Longshoreman's and Warehouseman's Union v. Wirtz,* 170 F.2d 183 (1948).

"It would seem, therefore, that if such consequences are to be avoided the statute must be given such a construction as will be reasonable and consistent with its provisions. That it was not the intent of Congress to limit jurisdiction to the constitutional courts seems reasonably clear, and indeed authority for this view is not wanting. . . .

". . . It is undoubtedly the duty of the Court to ascertain the intent of Congress from the words used in the act, in the light of its aims, and to extend its operation to broader limits than its words appear to import if the Court is satisfied that their literal meaning would deny application of the act to cases which it was the intent of Congress to bring within its scope. . . .

"In view of the fact that this Court is vested with the jurisdiction of a district court of the United States and my conclusion that it was the legislative intent that the act should have a general and uniform application, I am constrained to hold that the term 'district court of the United States,' as used in the act, comprehends this Court. . . ."

This decision was sustained by the Court of Appeals for the Ninth Circuit in *International Longshoremen's Union v. Juneau Spruce Corp.,* 13 Alaska 291, 307; 189 F.2d 184 (1951) and further sustained on appeal to the United States Supreme Court in *International Longshoremen's Union v. Juneau Spruce Corp.,* 13 Alaska 536, 541; 342 U.S. 237, 240 (1952). In sustaining this decision Justice Douglas stated that it would be more consonant with the uniform, national policy of the Act to allow petitions in all United States

district courts including the Alaska court and observed:

> "... That reading of the Act does not, to be sure, take the words 'district court of the United States' in their historic, technical sense. But literalness is no sure touchstone of legislative purpose. The purpose here is more closely approximated, we believe, by giving the historic phrase a looser, more liberal meaning in the special context of this legislation."

It would seem odd that Congress would create a legislative federal district court to float in limbo without appeals therefrom or without appellate supervision. The logical policy for Congress to follow would be to place all species of federal district courts with a limited geographical jurisdiction subject to appellate review by and under the supervision of the Court of Appeals and the Judicial Conference for the circuit within which such court should be located. The presumption should be that this is the congressional intent since any other intent would be illogical.

This analysis is substantially the same as that expressed in *United States v. Marrone,* Cr. No. 4033, *United States v. Emberg,* Cr. No. 4031, consolidated, Alaska, Third Division, opinion dated April 9, 1959. The text of this opinion is set forth in full in appendix D.

III.

UNDER ARTICLE I, SECTION 8, CLAUSE 18, UNITED STATES CONSTITUTION, CONGRESS MAY MAKE ALL LAWS NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THE EXPRESS POWERS OF THE FEDERAL GOVERNMENT; AND CONSEQUENTLY, PURSUANT TO THE POWER TO ADMIT STATES INTO THE UNION, CONGRESS MAY CONTINUE THE APPELLATE JURISDICTION OF CONSTITUTIONAL COURTS OVER CASES ARISING IN THE STATE WITH THE CONSENT OF THE STATE.

A. The United States Court of Appeals for the Ninth Circuit has jurisdiction to hear appeals from both constitutional and legislative courts, including the District Court for the Territory of Alaska.

The question now runs to the power of Congress to provide for review of the decisions of the Alaska courts subsequent to statehood in the United States Court of Appeals for the Ninth Circuit.

Citation is unnecessary to show that this court is a constitutional court and that the Alaska courts are legislative courts (unless they are state courts, the appellate review of which is reposed in this court, a suggestion which will be subsequently discussed).

Basically, this problem hinges upon the doctrine of separation of powers. Constitutional courts, with their independence given by Art. III, are vested with the judicial power of the United States. Early in our history it was found that Congress, pursuant to other powers, could create tribunals without the aid or restrictions of Art. III. This was revealed as to territorial courts in *American Insurance Co. v. Canter,* 1 Pet. 511, 7 L. ed. 242 (1828), where Chief Justice Marshall stated at page 546:

> "They are legislative courts, created . . . in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the 3rd article of the Constitution . . . although admiralty jurisdiction can be exercised in the states in those courts, only, which are established in pursuance of the 3rd article of the Constitution; the same limitation does not extend to the territories."

The import of the foregoing is that in a state only an Article III court can exercise the judicial power conferred by that article. The underlying theory is that under the separation of powers the judicial power of the United States is entrusted to courts which are independent of Congress by reason of tenure during good behavior and protection from reduction of compensation.

However, courts have come a long way from the *Canter* case, *supra.* Legislative courts and constitutional courts may be combined in the same court in the District of Columbia, *Keller v. Potomac Electric Power Co.,* 261 U.S. 428, 43 S. Ct. 445, 67 L. ed. 731 (1923). A legislative court may be created which exercises power previously exercised by an Article III court. The Court of Claims is such a court. *Ex parte Bakelite Corp.,* 279 U.S. 438, 49 S. Ct. 411, 73 L. ed. 789 (1929). Finally, it is seen that the "judicial power" vested in constitutional courts is not the limit of jurisdiction which Congress may give to those

courts. Judicial functions incidental to non-Article III legislative powers of Congress can be conferred on courts existing under Art. III[3] and conversely, under the rule of the *Bakelite* case, *supra,* Congress may remove some of the judicial power from the constitutional courts in implementing non-Article III powers of Congress. See *"Federal Legislative Courts,"* 43 *Harvard Law Review* 894 for the complexity involved in these distinctions and a history of the development of these concepts.[4]

The ability of Congress to provide for such appeals is, of course, based upon the power to admit new states and to do all things necessary and proper to accomplish that end. When a state is admitted, Congress may constitutionally continue appellate jurisdiction over legislative courts in cases pending in constitutional courts. *Express Co. v. Kountze Bros.,* 8 Wall. 342, 350, 19 L. ed. 457 (1869). With the coming of statehood the constitutional basis for such appellate jurisdiction shifts from the power of Congress

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[3]*National Mutual Ins. Co. v. Tidewater Transfer Co.,* 337 U.S. 582, 69 S. Ct. 1173, 93 L. ed. 1556 (1949); *O'Donoghue v. U.S.,* 289 U.S. 516, 53 S. Ct. 740, 77 L. ed. 1356 (1933); *Siegmund v. General Commodities Corp.,* 175 F. 2d 952 (CCA 9th 1949).

[4]A distinction should be drawn between problems where jurisdiction based upon both legislative and Article III sources is reposed in one court and instances where Congress attempts to impose legislative functions (as differentiated from judicial functions with legislative power as their source) upon an Article III court. This is readily seen in the *Keller* case, *supra,* where, although it was proper for District of Columbia courts to act both as a legislative and a constitutional court, and to that end perform the legislative function of rate setting, still, the Supreme Court of the United States could not review such a legislative function of those courts.

to enact all needful laws respecting a territory of the United States to its power to admit states into the Union.

B. Alaska can and has consented to continuing federal appellate jurisdiction.

Any objection that continuing federal appellate jurisdiction is an imposition upon the new State, depriving it of political rights so as to make the admission not on an equal footing, is answered by the fact that the State has consented to such jurisdiction, and, by its appearance here, continues to consent and is precluded from withdrawing that consent without an amendment to the Constitution of the State. That Constitution provides, in addition to Art. XV, § 17, *supra,* by Art. XII, § 13, that all the provisions of the Enabling Act are consented to by the State. In addition, the people of the State voted favorably upon the third proposition of § 8(b) of the Enabling Act, consenting to the provisions of that Act.

Judge Hodge, in *United States v. Egelak,* Cr. No. 1661 and *United States v. Blodgett,* Cr. No. 1668, Consolidated, Alaska, Second Judicial Division, opinion dated May 12, 1959, after setting forth portions of Chapter 50, *Session Laws of Alaska* 1959 regarding legislation to implement succession of courts observed:

> "Nothing could be more specific than the declaration of intent of the Legislature to accept the present courts and vest them with jurisdiction until the State courts are established. Therefore the contention of the defendants that Congress cannot create or establish a state court system for

> Alaska, and the contention of the amicus curiae that Congress has 'imposed' such system upon the State 'entirely within the discretion of the President of the United States', cannot be sustained."

The text of this opinion and of Chapter 50, *Session Laws of Alaska* 1959 are set forth in full in Appendix B.

See *Green v. Biddle,* 8 Wheat. 1, 89, 5 L. ed. 547 (1823) and 10 *Columbia Law Review* 591 for the proposition that whether or not a condition of statehood is properly imposed upon a new state, no complaint can be made if the condition is part of the organic law of the state. In effect, such a condition is not void but only voidable upon proper action by the state.

A distinction should be made between invalid conditions of an Enabling Act which deprive a state of equal footing and temporary beneficial measures to which the state extends a continuing consent. In this case Congress has exercised a power which is proper to the smooth admittance of the new State. This is not an exaction and withholding of political power as that condemned in *Coyle v. Oklahoma,* 221 U.S. 559, 31 S. Ct. 688, 55 L. ed. 853 (1911). There Congress imposed a condition forbidding the state to change the capital for a period of five years. The condition was never a part of the Oklahoma Constitution and hence was never the law of the state. Here we are dealing with a congressional provision which actually enables Congress to aid the State and which is in aid of the exercise of its power to admit new states.

IV.

THE COURTS BELOW CONTINUE THE SAME JURISDICTION UNINTERRUPTED BY STATEHOOD AS LEGISLATIVE COURTS VESTED WITH BOTH STATE AND FEDERAL JURISDICTION.

A. A legislative court can continue to function under power of Congress to admit new states.

It is, of course, paramount to the exercise of jurisdiction in this court that the courts below are proper repositories of the jurisdiction which Congress has continued under the Enabling Act for a temporary period. These courts may be considered as legislative courts with the same jurisdiction as before but with a different source of power being responsible for the grant of Congress of that jurisdiction. Instead of the basis of jurisdiction being the power to make all needful rules governing territories, the power now results from the authority to admit new states and to make all laws necessary to implement the admission in an orderly manner. To the extent that this is objected to as vesting the judicial power in a legislative court, see the *Bakelite* case, *supra,* where jurisdiction previously exercised at times by constitutional courts was properly vested in a legislative court. The court is respectfully referred to the opinion of Judge McCarrey in *United States of America v. Everett Starling,* Alaska, Third Division, No. 3973 Cr., decided February 21, 1959, in support of this analysis. In order not to duplicate Judge McCarrey's opinion, the argument of the State will be very briefly set forth. Congress has the implied power to implement its express powers. See *McCulloch v. Maryland,* 4 Wheat. 316 (1819). Precedent for the exercise of this type of

power is *Express Co. v. Kountze Bros.,* 8 Wall. 342, 19 L. ed. 457 (1869). In that case Congress, in exercising its powers to admit territories, provided for disposition of cases pending in the territorial courts. See also *Freeborn v. Smith, supra.*

B. Benner v. Porter can be distinguished.

Benner v. Porter, 50 U.S. 235, 13 L. ed. 119 (1849) is a leading case cited by petitioner who would find jurisdiction in this case wanting. Jurisdiction in a former Florida territorial court was found lacking after statehood with respect to an action in admiralty. The case can be distinguished as follows:

1. The state courts were in existence. Therefore, there was no emergency or need to use former territorial courts as state courts as an interim measure.
2. The United States District Court for the District of Florida was in existence and had jurisdiction to take federal cases.
3. The state of Florida did not consent to continuance of jurisdiction of former territorial court.
4. The Congress did not provide for continuance of jurisdiction over federal matters in the former territorial court. Congress made no attempt to use any of its implied powers in exercise of its express power to admit states.

V.

AS AN ALTERNATIVE, THE JURISDICTION OF THE COURT OVER STATE MATTERS MAY BE UPHELD UNDER THEORY THAT IT IS "BORROWED" BY STATE, AND JURISDICTION OVER FEDERAL MATTERS UNDER THE THEORY THAT FEDERAL JURISDICTION IS DELEGATED TO THE "STATE" COURT.

A. The State has "borrowed" the District Court for the Territory of Alaska for its purposes.

The intent of Congress and of the people of Alaska when they ratified the statehood act was evidently to maintain the status quo with respect to the existing legislative federal courts until the State and the Federal Government could create the usual system of state and federal courts. Accordingly, the theory which would appear most reasonable would be that these courts were to be continued as *legislative* courts for the interim period. If jurisdiction cannot be found under this theory, it may be found under the theory that they have jurisdiction over state matters as "state courts" whose court machinery is "borrowed" from the Federal Government. This may well be the result of the adoption of these courts by Art. XV, § 17, of the State Constitution, *supra.* If the power of these courts is founded therein, then they are state courts. As will later be explained, the Federal Government may constitutionally delegate jurisdiction to these "state" courts to try federal cases.

In *Ames et al. v. Colorado Cent R. Co.,* 1 Federal Cases 750, Case No. 324 (1876), the Federal Government made its former territorial courts available to the then new State of Colorado. The Constitution of Colorado provided:

". . . to the effect that all 'territorial officers should hold and exercise their respective offices and appointments until superseded under this constitution.' . . ."

The court observed:

"The territorial courts cease, on the admission of the state, to be courts of the territory, for the territorial government is displaced and abrogated; but, by adoption on the part of the state, with the consent of congress, these courts become the provisional and temporary courts of the state."

Evidently, at the time of statehood a federal court was created. The following is from page 752 of 1 Federal Cases:

". . . Pending cases which might have been brought in the federal courts established by the act, had such courts existed when the cases were commenced, are transferred to the proper federal court, which is declared to be the 'successor' of the territorial courts, a term which implies that these courts cease to exist as courts of the general government. All other cases remain and belong to the courts adopted or established by the constitution of the state. . . ."

B. Jurisdiction over federal cases may be vested by the Federal Government in the District Court for the Territory of Alaska.

The courts which have been designated in this discussion as "state" courts would be perfectly suitable forums for the continued exercise of federal jurisdiction. They act no differently than they did before the time of statehood. They are, in fact, territorial courts with federally-appointed and paid judges, car-

ried over for an interim period. In trial of federal cases—federal law, federal rules and federal procedure would apply in toto. The only difference between the *Colorado* case and the instant case is that in Alaska the former territorial court has not shed its federal functions under the Alaska Statehood Act and, therefore, except for titles and labels it is no different than the former territorial court. There is no reason why that court should not continue as a forum for federal cases during the transition period.

There is ample precedent for the delegation of federal jurisdiction to nonfederal courts. During the Federal Constitutional Convention, the propriety of the exercise of the federal judicial power by the state court was acknowledged by the express desire of one delegate that Congress should make use of the state tribunals. Mad. Jour. (ed. Scott) 379. In the debates on the Judiciary Act of 1789, it was even urged that no inferior federal tribunals should be established at all, 1 Ann. Cong. 783, 798-832 (1789). Collections of penalties under the Internal Revenue Law were laid in state courts at an early date. Act Mar. 3, 1791, 1 Stat. L., 199. In the past state courts have generally refused to exercise delegated congressional authority to enforce *penal* laws of Congress. *Teall v. Felton,* 1 N.Y. 537, 546. 49 Am.Dec. 352, 355 (1848) affirmed 12 How. 284, 13 L. ed. 990. This refusal was in part based upon the theory that one sovereign will not enforce the penal laws of another. However, this doctrine of sovereignty of the state as opposed to the central government has been objected to on the ground

that federal law is not only the supreme law of the land but applies in each state as much as state law does. *Ward v. Jenkins,* 10 Met. 583, 589. See also *Claflin v. Houseman,* 93 U.S. 130, 136, 23 L. ed. 883 (1876). The Supreme Court in *Testa v. Katt,* 330 U.S. 386, 67 S. Ct. 810, 91 L. ed. 967 (1947) has held that the Congress may use the state courts to enforce the Emergency Price Control Act, a federal statute. The State of Alaska would agree with the Federal Government that "it is also settled that whether civil, penal, or criminal in character, the laws of the United States are the laws of the several states in the sense that they may be entrusted to state courts for their enforcement." This principle should be particularly free from doubt where the state consents to enforce federal statutes in its courts.

Another theory which has been advanced to support the proposition that state courts with judges not appointed pursuant to Article III may maintain jurisdiction over the judicial power is that Congress does not delegate authority to exercise the jurisdiction but simply provides that the acts of the state court with relation to such subject matter are valid. *Beavins Partition,* 33 N.H. 89, 95 (1856). This, however, seems to beg the question. At any rate:

> "It is too late to question the constitutionality of the devolution of this authority upon the courts of the states, or their jurisdiction to exercise it. These issues have been settled by prescription and practice, and they are no longer open to question."
>
> *Levin v. U.S.,* 128 F. 826, 829 (1904).

See also

U.S. v. Jones, 109 U.S. 513, 520, 27 L. ed. 1015 (1883).

In summary, it seems that the state courts usually are held to have discretion as to whether they will or will not assume the jurisdiction in the absence of congressional mandate. Jurisdiction given under federal penal laws is usually refused, while civil jurisdiction is usually accepted. Congress can prohibit the exercise of the jurisdiction or it can enforce the acceptance of it. Certainly, it can no longer be questioned that, Congress willing, the state courts may exercise jurisdiction over cases arising under the federal judicial power. If the District Court for the Territory of Alaska is a state court, then it is bound not only by the Enabling Act but also by the State Constitution and, therefore, has the duty under both state and federal law to exercise jurisdiction over cases arising under the judicial power of the United States.

VI.

THE POWER OF THE UNITED STATES TO ADMIT NEW STATES SHOULD BE BROADLY CONSTRUED TO PERMIT REASONABLE AND NECESSARY TRANSITION MEASURES.

The United States Constitution makes no detailed provisions for the enlargement of the United States or the creation and addition of a new sovereignty, that is, of a state, nor is detailed provision made concerning the acquisition of new territories, the secession of states and territories, and other problems re-

lating to the basic sovereignty of the nation. Yet, the power to act as a sovereign, "a power which must belong to and somewhere reside in every civilized government." *(Andrews v. Andrews,* 188 U.S. 14, 33, 23 S. Ct. 237, 47 L. ed. 366 (1903)), has been found in every case where these fundamental political questions of sovereignty have been at issue and even when the power to cope with these problems has not been expressly spelled out in the Constitution. For example, courts and governments were created for newly created territories, the area comprised in the Louisiana Purchase was acquired, the Union continued to govern despite the secession of Confederate States, the remaining states created a new state—West Virginia—and eventually the Nation was rejoined. These problems were met, but the underlying reason justifying the results was never well described until *Missouri v. Holland,* 252 U.S. 416, 40 S. Ct. 382, 64 L. ed. 641 (1920), where Justice Holmes recognized that:

> "With regard to that we may add that when we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago. The treaty in question does not contravene

> any prohibitory words to be found in the Constitution. The only question is whether it is forbidden by some invisible radiation from the general terms of the Tenth Amendment. We must consider what this country has become in deciding what that Amendment has reserved."

Substantial problems can be expected when the people of a state and nation choose to create a new sovereignty and when the elected representatives of a nation choose to enlarge their sovereignty by the creation and acceptance of a new state. Fortunately, the problems with respect to succession of courts during the transition of territories to states have never been severe because of several circumstances. Many of the states admitted had functioning territorial court systems with territorial supreme courts. The volume and complexity of litigation were never great enough in the past to prevent a quick and easy transfer of cases to United States district courts which were created and ready to function upon admission of the various states. Alaska as a territory was denied the privilege of its own separate court system and, in particular, of a territorial supreme court. Dockets of the District Court for the Territory of Alaska are crowded with mixed federal and nonfederal cases. Alaska of 1959 is totally unlike New Mexico of 1912 and the other states earlier admitted.

A narrowly legalistic construction of Article III would result in problems in the administration of justice unprecedented in American history. Every judicial action after January 3, 1959, would be void

and of no effect. There will be a few good citizens in Alaska who will find themselves bigamists under the law with invalid divorces. No court in Alaska will have the power to pass criminal sentence or to issue a writ of habeas corpus.

Many Alaskans have relied upon the validity of the acts of this court system since the date of admission. Convictions, judgments, arrests, indictments, divorces, attachments, marshal's sales since January 3, 1959, have been done and relied upon. Almost the entire exercise of government since that date would be void and of no effect if § 18 were to fall.

Further, the implementation of a state court system could not readily be accomplished in any short period. The administration of courts must be organized, rules adopted, the real and personal property necessary to a court must be obtained, and competent judges must be installed. Jails and prisons must be constructed, leased or otherwise acquired. As soon as a United States District Court for the District of Alaska begins to function, the Federal Government will have to instruct its marshals and deputy marshals, prosecutors, and jailers to discontinue their duties with respect to non-federal matters since under § 18 of the Alaska Enabling Act, these duties are to be assumed by the State of Alaska when the United States District Court for the District of Alaska is, according to a Proclamation of the President, ready to assume its functions.

It is in areas such as this that courts have found it impossible to reconcile a narrow interpretation of the

Constitution with the very concept of sovereignty inherent in our constitutional system. If it was ever appropriate to apply a liberal construction to an interpretation of the United States Constitution, it should be applied here. A broad construction should be placed upon the power of the United States to admit states. Reasonable latitude should be allowed for essential transition measures.

VII.

SINCE ADMITTANCE OF A STATE IS BASICALLY A POLITICAL MATTER, GREAT JUDICIAL RESTRAINT SHOULD BE EXERCISED IN OVERTURNING LEGISLATIVE MEASURES TO FACILITATE A REASONABLE TRANSITION.

The provisions of the act of admission, Public Law 85-508, 85th Congress, are carefully calculated to meet the needs of the new state. These provisions are the result of extensive congressional investigation.

> "A greater amount of information has been assembled regarding Alaska than in the case of any other territory which has been admitted to the Union. Effort has been made to study every facet of the effect statehood would have on both Alaska and the United States."
>
> House Report No. 624, June 25, 1957, 85th Congress, First Session, accompanying the act of admission.

It is obvious that Congress has bent every effort to investigate and facilitate the admission of Alaska.

Pursuant to Art. IV, § 3 of the Constitution of the United States, Congress is entrusted with the power to

admit new states into the Union. This power is only subject to the limitation contained in Art. III, § 4 of the Constitution, guaranteeing that every state shall have a republican form of government, and to the concept of equality of states. Congress has traditionally approved the constitution of each new state as being republican in form. This power is fundamental to the existence of the Union—nothing is more basic to the growth of the union of states. The enforcement of the constitutional guarantee of a republican form of government belongs to the political department. *Taylor v. Beckham,* 178 U.S. 548, 20 S. Ct. 890, 1009, 44 L. ed. 1187 (1900). Matters involving sovereignty and political rights are often held not to be within the province of the judicial branch of government. *Cherokee Nation v. Georgia,* 5 Pet. 1, 8 L. ed. 25 (1831). Congress, in the act admitting Alaska, found the Constitution of the State to be republican in form and by so doing sanctioned the judicial system for the transition period contemplated by the Alaska Constitution and the Enabling Act. This determination should not be lightly overturned.

Since the prospect of an immediate loss of present courts was not contemplated by either the Congress or the state government, the State of Alaska has proceeded under the assumption that the arrangement for interim courts set forth in the Enabling Act is valid. Indeed it has had little choice. It would have been a virtual impossibility to create overnight a judicial system, make provision for prosecution of criminal cases, empower prosecuting attorneys, assume the law

enforcement functions of the United States marshals, and establish and maintain an entire penal system. These problems are magnified by the necessity of spreading the judicial system, law enforcement agents, etc. over an area one-fifth the size of the United States.

Fortunately, the State of Alaska and the Federal Government, as a political matter, have not attempted to effect the whole transition in great haste. Alaska, since its admission to the Union on January 3, 1959, has directed its legislative efforts toward realization of the goal contemplated in the judiciary article of the State Constitution, the schedule of transitional measures therein respecting transfer of court jurisdiction, and § 18 of the Enabling Act. These efforts are evidenced by certain acts passed by the 1959 State Legislature which are designed to implement the State Constitution and the Enabling Act, both of which provide for the orderly development of the state judicial system and a systematic transfer of cases to the newly established courts.

Among these acts of the Alaska State Legislature is Chapter 50, SLA 1959 (see appendix), which provides, *inter alia,* for the promulgation of rules of civil and criminal proceedings within the courts of the State of Alaska; provides for their jurisdiction, the nomination, qualification and appointment of justices and judges; provides for periodical approval by the voters; provides for the filling of vacancies and removal of justices and judges; provides for the compensation of justices and judges; provides for the administration of the court system; and provides for an effective date.

It is noteworthy that Chapter 50 contains the following:

"Sec. 31. Commencement and Transfer of Causes.

. . . . . .

"(2) The jurisdiction of the courts of the State in this Act provided shall be exclusive from and after the 3rd day of January, 1962, but prior to that date shall be non-exclusive, and nothing in this Act shall diminish or deprive the District Court of the State of Alaska *or the Court of Appeals* or the Supreme Court of the United States of jurisdiction as provided by Public Law 508, 85th Congress, and other laws applicable thereto. (Emphasis added.)

"Sec. 32. Declaration of Intent and Method of Transition. It is the intent of the Legislature by the passage of this Act to provide for the organization of the State courts in an orderly manner so that the same will be completed on or before January 3, 1962 and so that during the intervening period advantage may be taken of the district and appellate structure referred to in Public Law 508, 85th Congress. . . .

. . . . . .

"(4) Notwithstanding the provisions of subsections (1), (2) and (3) of this section, in the event that either: a court of competent jurisdiction, by final judgment, declares that *the District Court of the State of Alaska* lacks jurisdiction to determine causes arising under the laws of the State, notwithstanding the provisions of Public Law 508, 85th Congress; or the President of the United States, by executive order, terminates the jurisdiction of the District Court of the State

> of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices or judges of all of the supreme and one or more or all superior courts of the State and in any event shall submit all of said names prior to January 3, 1962." (Emphasis added.)

At the time Chapter 50 was passed, the Legislature assumed, and understandably so, that the provisions of § 18 of the Enabling Act postponing the effective date of the "preceding sections" would continue the handling of appeals by the Court of Appeals for the Ninth Circuit as well as the District Court's jurisdiction over cases commenced in Alaska. Subsequently, however, the jurisdiction of the Court of Appeals was challenged, and accordingly, § 32(4) of Chapter 50, SLA 1959, was amended by Chapter 151, SLA 1959, to read as follows:

> "Notwithstanding the provisions of subsections (1), (2) and (3) of this section, in the event that either: a court of competent jurisdiction, by final judgment, declares that the *District Court of the District of Alaska* lacks jurisdiction to determine causes arising under the laws of the State, notwithstanding the provisions of Public Law 508, 85th Congress; or the President of the United States, by executive order, terminates the jurisdiction of the District Court of the District of Alaska; the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices or judges of all of the supreme and one or more or all superior courts of the State and in any event shall submit

all of said names prior to January 3, 1962. In the event that a court of competent jurisdiction, by final judgment, declares that the *United States Court of Appeals for the Ninth Circuit* lacks jurisdiction to hear appeals from the District Court of the District of Alaska, the Judicial Council shall forthwith meet and submit to the Governor the names of the persons nominated as justices of the supreme court and appeals from the District Court of the District of Alaska may be made to the State Supreme Court. If, upon the occurrence of any of the events set forth in this subsection, the members of the first Judicial Council have not been appointed, the Governor shall forthwith fill the initial vacancies." (Emphasis added.)

From the foregoing, the court will see that the Alaska State Legislature has construed § 18 of the Enabling Act so as to continue the functioning of the existing *judicial system* and not merely the functioning of the District Court for the Territory of Alaska. Both Chapter 50 SLA 1959, and the amendment thereto make such a conclusion inescapable. It is submitted that the contemporary construction of one of the parties to the act of admission is deserving of consideration.

Another Act evidencing the efforts Alaska has made and is making to provide for its judiciary is Chapter 48, SLA 1959. It provides, in pertinent part, as follows:

"Section 1. Authorization. The Legislative Council is hereby directed to conduct a study and prepare appropriate legislation designed to estab-

> lish an overall judicial system for the State of Alaska. The study shall include a review of all facets of the Judicial branch of the State government, including a comprehensive judicial code, the physical facilities needed, and the initial capital outlay and annual operating costs anticipated. The study and accompanying legislation shall be completed and presented to this Legislature within 90 days from the day this Act becomes law."

The above-quoted Act was implemented by Chapter 49, SLA 1959, which made an appropriation to carry out the provisions thereof.

Consequently, Alaska has by deliberate progress, moved toward its court system as set out in the State Constitution. Alaska, unlike other territories when admitted, must begin from the foundation to erect a court system. The foregoing legislation indicates the meaning the State of Alaska has placed upon § 18 of the Enabling Act. Alaska has relied upon that Act and the continued jurisdiction of the United States Court of Appeals for the Ninth Circuit. This emphasizes the gravity of overthrowing the basically political arrangements arrived at to enable one sovereign, the State of Alaska, to enter and enlarge another sovereign, the United States of America.

CONCLUSION.

The Enabling Act, as seen in a reasonable light, portrays the intent of Congress to continue the appellate jurisdiction of this court over all cases and con-

troversies arising in Alaska. It is not unconstitutional to permit an Article III court to review decisions of either a legislative or state court. The courts in Alaska retain all prior jurisdiction even if they are legislative courts, since such courts may exercise the judicial power of the United States, and since the devolution of such jurisdiction upon them is necessary and proper to effectuate the power of Congress to admit new states. If, however, these courts are state courts, there is no question but that Congress may offer, and the State may accept, the jurisdiction of cases arising under the judicial power of the United States. In the latter case, the Federal Government may validly delegate federal jurisdiction to such state courts.

Dated, Juneau, Alaska,
May 21, 1959.

Respectfully submitted,

JOHN L. RADER,
Attorney General of Alaska
DAVID J. PREE,
First Assistant Attorney General
JACK O'HAIR ASHER,
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Assistant Attorneys General

(Appendix Follows.)

Appendix.

Appendix A

United States Court of Appeals
for the District of Columbia

No. 15,075

Ketchikan Packing Company, et al.,
Appellants,

vs.

Fred A. Seaton, Secretary of the Interior, et al.,
Appellees.

Appeal from the United States District Court for the District of Columbia

Filed May 14, 1959

Mr. Howard C. Westwood, with whom *Messrs. Stanley L. Temko, Robert L. Randall,* and *William H. Allen* were on the brief, for appellants.

Mr. Jerome A. Cohen, Assistant United States Attorney, with whom *Messrs. Oliver Gasch,* United States Attorney, and *Carl W. Belcher,* Assistant United States Attorney, were on the brief, for appellees. *Mr. John F. Doyle,* Assistant United States Attorney, also entered an appearance for appellees.

Before PRETTYMAN, *Chief Judge,* and FAHY and BURGER, *Circuit Judges.*

PER CURIAM: Appellants attack[1] the validity of an order of the Secretary of the Interior dated March 7, 1959, 24 Fed. Reg. 2053-71, which has the effect of prohibiting the use of fish traps in Alaskan waters effective April 18, 1959.[2] The order recites its authority as being Section 1 of the White Act,[3] and before this court the Secretary argued that the White Act has been so amended by Section 6(e) of the Alaska Statehood Act[4] as to compel him to order the prohibition. In promulgating the order, the Secretary says he merely complied with a statutory duty imposed by Congress.

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[1]This is an appeal from the District Court's denial of declaratory judgment and preliminary injunction. We granted appellant's motion for a stay pending appeal and expedited the case. Appellants adequately represent three different interested classes: (1) salmon canning companies dependent to a substantial degree upon fish caught by traps in Alaskan waters; (2) individuals whose livelihoods have been dependent upon Alaskan trap fishing; and (3) companies and individuals who have ownership interests in Alaskan trap fishing locations.

[2]Except for certain fish traps enumerated in the order which are operated by Indian tribes or villages.

[3]43 Stat. 464 (1924), as amended by 44 Stat. 752 (1926), 48 U.S.C. Sec. 221: "For the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of the Interior from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, method, and extent of fishing as he may deem advisable." The White Act provides criminal sanctions for any violation of a regulation of the Secretary made pursuant to its authority. 43 Stat. 466 (1924), 48 U.S.C. Sec. 226.

[4]72 Stat. 339 (1958).

The so-called Westland proviso contained in Section 6(e) of the Statehood Act reads:

> "(T)he administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government *under existing laws* until the first day of the first calendar year following the expiration of ninety legislative days after the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources *in the broad national interest. . . .*"[5] (Emphasis added.)

On January 3, 1959, simultaneously with the effective date of the Statehood Act, the Constitution of the State of Alaska became effective and with it three ordinances adopted by the people of Alaska along with the Constitution. Ordinance No. 3 provides:

> "As a matter of immediate public necessity, to relieve economic distress among individual fishermen and those dependent upon them for a livelihood, to conserve the rapidly dwindling supply of salmon in Alaska, to insure fair competition among those engaged in commercial fishing, and to make manifest the will of the people of Alaska, the use of fish traps for the taking of salmon for commercial purposes is hereby prohibited in all the coastal waters of the State." H.R. *Rep. No.* 624, 85th Cong., 2d Sess., app. A, 83 (1957).

The Secretary read the words "under existing laws" in the Westland proviso as including Ordinance No. 3

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[5]On April 27, 1959, the Secretary made the certification contemplated by the Westland proviso.

of Alaska, and concluded that the Statehood Act which "accepted, ratified and confirmed" the Alaska Constitution, amended the White Act by prohibiting the use of such traps in Alaskan waters as set forth in the ordinance. In other words, the Secretary argues that the Congress did not intend that he should suspend the Alaskan ordinance, adopted by popular vote along with the Constitution, in the interim period while he administered the state's wildlife resources.

One key consideration in the problem is that we are dealing with a transition measure—a temporary, not a permanent, provision. What was the intention of Congress concerning the interim transition period between federal territorial control and full statehood? In effect the Westland proviso makes the Secretary a "trustee" for both the federal government and the new state "in the broad national interest" during the transition of administration from the federal to the state authorities. The Secretary, in that unique capacity, could not reasonably disregard a valid law of Alaska which was "existing"[6] on January 3, 1959, the effective date of the Alaska Statehood Act which defined his powers over wildlife resources for the interim period commencing on that date.

We would ignore the obvious were we to fail to state that the question posed to us is close; no reading of the words of the statute, no part of the legislative

[6]See Jonesboro City v. Cairo & St. Louis R.R. Co., 110 U.S. 192, 198 (1883), "The phrase 'under existing laws,' in the section of the Constitution referred to, relates, we think, to the time of the adoption of the Constitution rather than to the time when the vote of the people was in fact taken."

history, no contemplation of a possible objective leads with absolute certainty to a clear answer. In such a situation, while the Secretary's interpretation of the powers conferred upon him by Congress is not binding on the courts[7] nevertheless it is entitled to considerable weight. In this instance his interpretation is reasonable, and it is consistent with the congressional plan for interim administration of natural resources described in the Westland proviso.[8] We think his view should be sustained.

Of necessity, in this unique interim situation, the Secretary must apply a federal sanction to effect the enforcement of a state law. See footnote 3 *supra.* This apparent anomaly can be explained only by reference to the fact that in this transition of authority the Secretary is operating in a dual capacity.

We have considered appellants' other contentions, including the argument that procedural errors occurred in the notice and hearings on the Secretary's action prohibiting fish traps, and we find no error which affects the validity of the Secretary's action.

The stay granted by this Court April 14, 1959, is therefore dissolved and the judgment of the District Court is

Affirmed.

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[7] *Cf.* Brannan v. Stark, 87 U.S.App.D.C. 388, 185 F.2d 871 (1950), *aff'd* 342 U.S. 451 (1952); Social Security Bd. v. Nierotko, 327 U.S. 358, 368-9 (1946).

[8] *Cf.* 104 *Cong. Rec.* 8738-39 (daily ed., May 28, 1958); *id.* at 8272-73 (daily ed., May 21, 1958); *id.* at 8490-91 (daily ed., May 26, 1958); *id.* at 10869-70 (daily ed., June 24, 1958).

Appendix B

In the District Court for the District of Alaska
Second Judicial Division

United States of America, Plaintiff, vs. Joseph Egelak, Defendant.	No. 1661, Cr.
United States of America, Plaintiff, vs. Robert R. Blodgett, Defendant.	No. 1668, Cr.

Russell R. Hermann, United States Attorney, Nome, Alaska, for plaintiff.

James A. von der Heydt, Nome, Alaska, for defendants.

Fred D. Crane and Warren Wm. Taylor, Fairbanks, Alaska, Amicus Curiae.

OPINION

On March 19, 1959, the defendant Joseph Egelak was indicted by the grand jury for the crime of manslaughter, in violation of Sec. 65-4-4 A.C.L.A. 1949. On March 23, 1959, the defendant Robert R. Blodgett was indicted for the crime of assault with a dangerous weapon, in violation of Sec. 65-4-22 A.C.L.A. 1949.

Both defendants have moved to dismiss the indictment upon the grounds: (1) that the District Court for the District of Alaska or the District Court for the Territory of Alaska is without jurisdiction to function in the State of Alaska; (2) that the indictment returned by the Grand Jury does not contain the endorsement of the names of the witnesses examined before the Grand Jury, as required by the provisions of Sections 66-8-52 and 66-11-1, Alaska Compiled Laws Annotated, 1949. On April 24, 1959, oral argument was had before the Court on the motion in the Eglak case, with the understanding that the issues involved would apply likewise in the Blodgett case.

Jurisdictional Question

At the time of hearing the defendants took the position that the decision of the Honorable J. L. McCarrey, Jr., in the case of *United States of America vs. Everett Starling,* Third Division, No. 3973, Cr., and associated cases, under date of Feb. 21, 1959 (..... F. Supp. .....), upholding the constitutionality of the transition measures provided by Sec. 18 of the Alaska Statehood Act (Public Law 85-508, 85th Congress), was dicta insofar as the jurisdiction of this court in cases involving violations of state statutes is concerned, for the reason that this case involved such jurisdiction in cases arising under Federal statutes. It also appeared at such time that no written opinion had been rendered by the District Judges of Alaska precisely touching upon jurisdiction in state cases, although similar motions or challenges to the juris-

diction of the court had been denied orally. *United States vs. Kosters,* Fourth Division; *United States vs. Deere,* Fourth Division. This Court was therefore requested to expressly pass upon the issues raised by such motion, although it appears that such issues were then and are now pending for determination by the Circuit Court of Appeals for the Ninth Circuit.

Subsequently, this court has received the opinion of Judge McCarrey in the case of *United States vs. Marrone,* Third Division, No. 4033, in which the issues raised by these motions are determined adversely to the contentions of the defendants. The position taken by defendants and amicus curiae is that the court is without jurisdiction for two reasons: first, the provisions of Sec. 18 of the Statehood Act are unconstitutional in that Congress may not impose upon the State of Alaska a judicial system, as each state must be admitted to the Union on an equal footing with all others; and, second, under the provisions of Sec. 12 of the Statehood Act the appellate jurisdiction of the Circuit Court of Appeals for the Ninth Circuit to hear appeals from this court was repealed, without provision for continuance of such right of appeal, and, therefore, that the defendant is left without any statutory right of appeal from the judgments of this court. Both of these issues were squarely presented in the Marrone case.

In this decision the Court directs attention to the provisions of Sec. 17, Art. XV, of the Constitution of the State of Alaska, and finds as follows:

> "In this section, the State of Alaska accepted the then established judicial system of the Territory of Alaska, including the appellate court, the United States Court of Appeals for the Ninth Circuit, for the transition period while the state court system was being established. Section 18 of Public Law 85-508, the Alaska Statehood Bill, was Congress's acceptance."

With respect to the second contention, the Court concludes:

> "I am of the opinion that there is a simple answer to this problem and that is that the United States Court of Appeals for the Ninth Circuit never lost its appellate jurisdiction over the present United States District Court in Alaska in either state or federal matters."

This decision, with which I fully concur, is stare decisis and determinative of such issues in this court. *State vs. Mellenberger,* 95 P. 2d 709, 128 A.L.R. 1506. However, I would add the following observations as additional compelling reasons for the holding that the State of Alaska has accepted the provisions of Sec. 18 of the Statehood Act.

The State Legislature has provided a system of Supreme and Superior Courts of the State of Alaska by Ch. 50, S.L.A. 1959, approved March 19, 1959. Secs. 31 and 32 of Art. III of this Act provide as follows:

> "Sec. 31. *Commencement and Transfer of Causes.* (1) the State courts shall be deemed organized for the purpose of transferring causes as provided in Section 17, Article XV of the Con-

stitution of the State of Alaska, on the 3rd day of January, 1962. Provided, however, that causes may be commenced, filed and determined in the State courts in each judicial district at the time of the appointment of one or more judges for such district.

(2) The jurisdiction of the courts of the State in this Act provided shall be exclusive from and after the 3rd day of January, 1962 but prior to that date shall be non-exclusive, and nothing in this Act shall diminish or deprive the District Court of the State of Alaska or the Court of Appeals or the Supreme Court of the United States of jurisdiction as provided by Public Law 508, 85th Congress, and other laws applicable thereto.

Sec. 32. *Declaration of Intent and Method of Transition.* It is the intent of the Legislature by the passage of this Act to provide for the organization of the State Courts in an orderly manner so that the same will be completed on or before January 3, 1962 and so that during the intervening period advantage may be taken of the district and appellate structure referred to in Public Law 508, 85th Congress. . . ."

Nothing could be more specific than the declaration of intent of the Legislature to accept the present courts and vest them with jurisdiction until the State courts are established. Therefore the contention of the defendants that Congress cannot create or establish a state court system for Alaska, and the contention of the amicus curiae that Congress has "imposed" such system upon the State "entirely within the discretion of the President of the United States", cannot be sus-

tained. In the same manner the contention of the defendants that Congress cannot create courts within a state other than in conformity with Article III, Sec. 1 of the Constitution of the United States is without merit, as such constitutional provision relates only to "the judicial power of the United States", relating solely to the Federal courts.

It should be further observed that the cases relied upon by defendants and amicus curiae of *Benner vs. Porter,* 50 U.S. 235, 13 L. Ed. 119, *American Insurance Co. vs. Canter,* 26 U.S. 511, 7 L. Ed. 242, and *Forsythe vs. U. S.,* 50 U.S. 571, 13 L. Ed. 262, have no real application to the issues in this case, as such relate to the continued jurisdiction of territorial courts in Federal cases, on admission of the Territory into the Union, as fully discussed by Judge McCarrey in the Sterling case.

With respect to the second contention, the Legislature has likewise made ample provision for appeals from this court during the interim period by an amendment to Sec. 32 (4), Article III, of the Judiciary Act (Ch. ..... S.L.A. 1959), providing that in the event that the Circuit Court of Appeals for the Ninth Circuit finds itself without jurisdiction to hear appeals from this court, the Supreme Court of the State of Alaska shall be immediately established, with jurisdiction over appeals from this court. Hence, it cannot be said that a defendant in this court would in any event be without right of appeal.

Endorsement of Names of Witnesses Upon Indictment

The sole question presented here is whether or not there is any actual conflict between the provisions of Sec. 66-8-52 A.C.L.A. 1949, requiring that when an indictment is found the names of witnesses examined before the grand jury must be inserted at the foot of the indictment or endorsed thereon, read in conjunction with Section 66-11-1 A.C.L.A. 1949, providing that the indictment must be set aside by the court when the names of the witnesses examined before the grand jury are not so inserted or endorsed thereon, and the provisions of Rule 7 (c) of the Federal Rules of Criminal Procedure proscribing the "nature and contents" of an indictment or information, making no reference to such endorsement; and the construction and application of the decision of the Circuit Court of Appeals for the Ninth Circuit upon this identical question in the case of *Soper vs. United States,* 220 F. 2d 158, 15 Alaska 475.

This question appears to be again pending upon an appeal to the Circuit Court in the case of *Short vs. United States,* the appellant's brief in which case is directed to the attention of the Court. Defendants direct attention to the mandatory provisions of the Alaska statutes and earnestly contend that there is no real conflict between such statutes and the Federal Rule; and that the decision in the Soper case is dicta and not binding on this court, and in conflict with a prior decision of the Circuit Court in the case of *Stephenson vs. United States,* 211 F.2d 702, 14 Alaska

603, wherein the court found no conflict between the Federal Rules and Sec. 58-5-1 A.C.L.A. with reference to cautionary instructions to juries.[1] Even though the decision of the Circuit Court in the Soper case might well be re-examined by that Court with respect to such actual conflict, such decision is binding upon this Court unless it can be considered dicta, or distinguished in point of law or fact. 21 *C.J.S.* 348, *Courts,* Sec. 198; *Forstmann vs. Rogers,* 35 F. Supp. 916; *New York Life Insurance Co. vs. Ross,* 30 F. 2d 80. This decision therefore bears careful analysis.

In this case a motion was made by defendant to dismiss the indictment upon the "stated grounds", among others, that the names of all of the witnesses who appeared before the grand jury were not endorsed thereon. The court in a footnote in the opinion held as follows:

> "Actually, the names of two witnesses were endorsed on the indictment. However, the names of witnesses are not required to be endorsed on any indictment in the District Court for the Territory of Alaska. Such indictments need only conform to the requirements of Rule 7 (c) of the Federal Rules of Criminal Procedure, 18 U.S.C.A. The indictment in this case did so conform. It should be noted and remembered that the Federal Rules

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[1]In appellant's brief in the Short case, it is also urged extensively that any contention that the entire Alaska Code of Criminal Procedure has been abrogated by the Federal Rules is flatly unsound. No such contention is made by the Government and it is conceded that only the laws of Alaska which are in conflict with such Rules would be so inoperative. 18 *U.S.C.A.* 3771 (formerly Sec. 687).

> of Criminal Procedure are now, and have been since October 20, 1949, applicable to all criminal proceedings in the District Court for the Territory of Alaska. See Rule 54 (a) (1) of said rules, as amended by the Supreme Court's order of December 28, 1948, 335 U.S. 953, 954, effective October 20, 1949. Sections 66-8-52 and 66-11-1, Alaska Compiled Laws Annotated, 1949, cited by appellants, became inoperative on October 20, 1949, and remain inoperative."

The grounds upon which it is urged that this decision is dicta are two: first, the statement by the court that the names of "two witnesses" were endorsed on the indictment; second, this decision appears in a footnote and is not actually a part of the decision in such case.

As to the first, it will be observed that the contention of the defendant was that the names of *all* witnesses were not so endorsed; therefore, the fact that the names of two witnesses were endorsed was not considered by the court as controlling, as the decision clearly indicates.

With regard to the second point, it has been established that a footnote is as much a part of the opinion as the matter contained in the body of the opinion, is as important as the remainder of the opinion, and has like binding force and effect. 21 *C.J.S. supra,* p. 407, Sec. 221; *Gray vs. Union Joint Stock Land Bank* (C.A. 6), 105 F. 2d 275; *Melancon vs. Walt Disney Productions* (Dist. Ct. App. Cal. 1954), 273 P. 2d 560.

Moreover, in the body of the opinion the Court further holds:

> "We further hold that the motion did not state any fact or facts warranting dismissal of the indictment, and that therefore the District Court would have been obliged to deny the motion, even if it had been made before trial—which it was not."

It is fundamental that a previous opinion deciding contentions identical in fact, law and application with those of the instant case should be followed on the principle of stare decisis unless and until reversed or overruled. 21 *C.J.S., supra,* 301, Sec. 186; *Words and Phrases,* Vol. 39-A, pp. 602-609; *Grand Rapids & I. R. Co. vs. Blanchard,* 38 F. 2d 470. It is true that the authority of a former decision as a precedent must be limited to the points actually decided. 21 *C.J.S. supra,* 380, Sec. 209. The decision in the Soper case clearly and actually decides the identical issues as presented in this case. A decision is dicta where the language is unnecessary to the decision or to the determination of the issues of the case, but where there is an adjudication of any point within the issues presented it is not dicta. 21 *C.J.S.* 309, *Courts,* Sec. 190; 14 *Am. Jur.* 295-7, *Courts,* Sec. 83; *Words and Phrases,* Vol. 12, pp. 557-563; *Valli vs. United States,* 94 F. 2d 687. The decision in the Soper case has since been followed in the District Court for the Territory (State) of Alaska, and must be held and considered to be stare decisis on the issues here presented, and binding upon this Court.

Defendants further contend that this ruling is inconsistent with instructions given by the Court to

the grand jury following the last portion of Sec. 66-8-52,[1] urging that there should be no distinction and that if the first portion of the statute is superseded so must be the last portion. There is merit in this contention, but the error lies instead in giving this instruction to the grand jury subsequently to the decision in the Soper case, which will be corrected. Such error is harmless so far as these defendants are concerned.

The Government further contends that the cited statutes are also in conflict with several other Federal Rules, but in view of the holding herein that the decision in the Soper case is controlling, this point need not be determined.

For the reasons assigned the motion to dismiss the indictments in both cases is denied. Appropriate orders may be presented accordingly.

Dated at Nome, Alaska, this 12th day of May, 1959.

/s/ Walter H. Hodge
District Judge

[1]This portion of the statute provides as follows:
". . . and if the indictment be for a misdemeanor only, and any witness has voluntarily appeared before the grand jury to complain of the defendant, his name must be marked as private prosecutor."

Appendix C

STATE OF ALASKA

CHAPTER 50

AN ACT

ıting to the supreme and superior courts of the State of Alaska; providing ›r the promulgation of rules of civil and criminal proceedings within the ›urts of the State of Alaska; providing for their jurisdiction, the nomination, ›ppointment, and qualification of justices and judges; providing for periodical ›pproval by the voters; providing for the filling of vacancies and removal of ıstices and judges; providing for the compensation of justices and judges; ›roviding for the administration of the court system; and providing for an ffective date.

(C.S.S.B. 7)

t enacted by the Legislature of the State of Alaska:

Article I. Supreme Court

ection 1. **Jurisdiction.** The supreme rt has final appellate jurisdiction in actions and proceedings. The su- ne court may issue injunctions, s of review, mandamus, certiorari, ıibition, habeas corpus, and all other s necessary or proper to the complete rcise of its appellate and other juris- ion. Each of the justices may issue s of habeas corpus, upon petition by on behalf of any person held in al custody and may make such s returnable before the justice him- or before the supreme court, or re any judge of the superior court he State. Appeals to the supreme rt shall be a matter of right, except the State shall have no right of eal in criminal cases, except to test sufficiency of the indictment or rmation.

Sec. 2. **Court of Record: Composition: General Powers.** The supreme court is a court of record, consists of three justices including the chief justice, and is vested with all power and authority necessary to carry into complete execution all its judgments, decrees and determinations in all matters within its jurisdiction, according to the Constitution, the laws of the State, and the common law.

Sec. 3. **Sessions of Court.** The supreme court shall always be open for the transaction of business in the manner determined by rule of the court. The supreme court shall hold sessions on dates and at places fixed by court rule.

The administrative director of courts shall maintain his office at the same place in the State as the supreme court maintains its headquarters.

Sec. 4. **Effect of Adjournment.** Adjournments from day to day, or from time to time, are to be construed as

recesses in the session, and shall not prevent the court from sitting at any time.

Sec. 5. **Process.** Process of the supreme court shall be in the name of the "State of Alaska", be signed by the clerk of the court or his deputy, be dated when issued, sealed with the seal of the court, and made returnable according to rule prescribed by the court.

Sec. 6. **Seal of Court.** The seal of the supreme court shall be a vignette of the official flag of Alaska with the words "Seal of the Supreme Court of the State of Alaska", surrounding the vignette.

Sec. 7. **Qualifications of Justices.** A justice of the supreme court shall be a citizen of the United States and of the State, a resident of Alaska for three years immediately preceding his appointment, have been engaged for not less than eight years immediately preceding his appointment in the active practice of law, and at the time of appointment be licensed to practice law in Alaska. The active practice of law shall include:

(1) Sitting as a judge in a state or territorial court.

(2) Actually being engaged in advising and representing clients in matters of law.

(3) Rendering legal services to any agency, branch, or department of a civil government within the United States or any state or territory thereof, in an elective, appointive or employed capacity.

(4) Serving as a professor, associate professor, or assistant professor in a law school accredited by the Ame Bar Association.

Sec. 8. **Vacancies.**

(1) **Initial Vacancies.** The ernor shall initially fill the offic supreme court justices, including office of chief justice, within fort days after receiving nominations the Judicial Council, by appointin of two or more persons nominate the Council for each position.

(2) **Vacancies.** The Governor fill any vacancy in the offices o preme court justices, including the of chief justice, within forty-five after receiving nominations from Judicial Council, by appointing o two or more persons nominated b Council for each vacant position.

The office of a supreme court ju including the office of chief justic comes vacant ninety days after the tion at which he is rejected by a m ity of those voting on the questio for which he failed to file his dec tion of candidacy to succeed hin and his successor may be appointed ing this period, such appointmer become effective upon the vacanc curring. A vacancy in said offices also occur by reason of the death tirement, resignation, forfeiture, o moval from office of any justice the event of any vacancy other tha initial vacancy, or immediately certification of rejection followin election, or immediately upon failu a justice to file declaration of candi the Judicial Council shall meet w thirty days after any of the said e occur and submit to the Governo

s of two or more persons nomi-
to fill each such vacancy.

. 9. **Oath of Office.** Each supreme
justice, upon entering office, shall
and subscribe to an oath of office,
red of all officers under the Con-
ion and such further oaths or
ations as may be prescribed by

. 10. **Approval or Rejection.**

(1) Each supreme court justice
be subject to approval or rejection
separate non-partisan statewide
at the first general election held
than three years after his appoint-
and if approved by a majority of
lectors voting on his candidacy, he
be retained in office. He shall
after be subject to approval or
ion in a like manner every tenth
If a majority of those voting on
andidacy reject his candidacy, he
not for a period of four years
after be appointed to fill any va-
in the supreme or superior courts
State.

(2) Each justice seeking to succeed
lf to office shall file with the Sec-
y of State a declaration of such
dacy not less than ninety days be-
he date fixed for the general elec-
at which approval or rejection is
site. The Secretary of State shall
ptly certify such candidacy to the
on officials of the State, who shall
re, and have available at the polls,
arate statewide ballot upon which
shall be stated the proposition:
1 .....
tained as justice of the supreme
for ten years?", with proper

provision for the marking of such propositions as "yes" and "no". The ballots shall be counted, returned, canvassed and certified in the manner provided by law for elective offices.

Sec. 11. **Incapacity.** Whenever the Judicial Council certifies to the Governor that a supreme court justice appears to be so incapacitated as substantially to prevent him from performing his judicial duties, the Governor shall appoint a board of three persons to inquire into the circumstances, and may on the board's recommendation retire the justice after hearing. Notice of the hearing shall be given to the justice in writing at least thirty days prior thereto.

Sec. 12. **Impeachment.** A supreme court justice is subject to impeachment by the Legislature for malfeasance or misfeasance in the performance of his official duties. Impeachment shall originate in the Senate and must be approved by a two-thirds vote of its members. The motion for impeachment shall list fully the basis for the proceeding. Trial on impeachment shall be conducted by the House of Representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the House is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but shall not prevent proceedings in the courts on the same or related charges.

Sec. 13. **Restrictions.** A supreme court justice while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States,

the State or its political subdivisions. Any supreme court justice filing for another elective public office forfeits his judicial position.

Sec. 14. **Compensation.**

(1) The chief justice shall receive $23,500.00 annually, and each associate justice shall receive $22,500.00 annually as compensation, payable monthly in twelve equal installments. Compensation of the chief justice or of an associate justice shall not be diminished during his term of office, unless by general law applying to all salaried officers of the State.

(2) No salary warrant shall be issued to any justice of the supreme court until he has made and filed with the State officer designated to issue salary warrants an affidavit that no matter referred to the justice for opinion or decision has been uncompleted or undecided by him for a period of more than six months.

Sec. 15. **Administrative Director.** The chief justice of the supreme court shall, with the approval of the supreme court, appoint an administrative director to serve at the pleasure of the chief justice and to supervise the administrative operations of the judicial system.

Article II. Superior Court

Sec. 16. **Superior Court.** There shall be one superior court for the State. The court shall consist of four districts which shall be bounded as follows:

First District: the area within election districts numbered one to six, both inclusive, as said districts are described Article XIV of State Constitution the effective date this Act;

Second District: the area within el tion districts numb ed twenty-one twenty-four, both clusive, as said tricts are described Article XIV of State Constitution the effective date this Act;

Third District: the area within el tion districts numb ed seven to fifte both inclusive, as s districts are descril in Article XIV of State Constitution the effective date this Act; and

Fourth District: the area within e tion districts numb ed sixteen to twe both inclusive, as s districts are descri in Article XIV of State Constitution the effective date this Act.

Sec. 17. **Jurisdiction and Venue.**

(1) (a) The superior court is trial court of general jurisdiction, v original jurisdiction in all civil criminal matters, specifically includi but not limited to probate and guardi ship of minors and incompetents.

ior court and its judges may issue
ctions, writs of review, mandamus,
tion, habeas corpus and all other
necessary or proper to the com-
exercise of its jurisdiction. A writ
beas corpus may be made return-
before any judge of the superior
The superior court has jurisdic-
n all matters appealed to it from
ordinate court, or administrative
y when such appeal is provided by
All such appeals shall be a matter
ght, except no appeal shall be
in any criminal case after a plea
ilty or by the State, except to test
ufficiency of an indictment or in-
tion. All hearings on appeal from
inal order or judgment of a sub-
ate court or administrative agency
be on the record unless the supe-
court, in its discretion, shall grant
l de novo, in whole or in part.

In case of an actual controversy
n the State, the superior court,
the filing of an appropriate plead-
may declare the rights and other
relations of any interested party
ng such declaration, whether or not
er relief is or could be sought. Any
declaration shall have the force and
of a final judgment or decree
shall be reviewable as such. Further
sary or proper relief based on a
ratory judgment or decree may be
ed, after reasonable notice and
ng, against any adverse party
e rights have been determined by
judgment.

2) The jurisdiction of the superior
shall extend over the whole of
State. All actions in ejectment or for the recovery of the possession of, quieting title to, for the partition of, or the enforcement of liens upon, real property shall be commenced in the judicial district in which the real property, or any part thereof affected by such action or actions, is situated.

(3) The court in which the action is pending may change the place of trial in any action from one place to another place in the same judicial district or to a designated place in another judicial district for any of the following reasons:

First: When there is reason to believe that an impartial trial cannot be had therein;

Second: When the convenience of witnesses and the ends of justice would be promoted by the change;

Third: When for any cause the judge is disqualified from acting; but in such event, if the judge of another judicial district is assigned to try the action, no change of place of trial need be made;

Fourth: If the court finds that the defendant will be put to unnecessary expense and inconvenience. Should the court find that said expense and inconvenience was intentonally caused, the court may assess costs against the plaintiff.

Sec. 18. **Courts of Record: General Powers: Sessions.** The superior court shall always be open, except on judicial holidays as determined by rule of the supreme court. Injunctions, writs of prohibition, mandamus and habeas corpus may be issued and served on holidays and non-judicial days. The superior court is a court of record and is vested

with all power and authority necessary to carry into complete execution all its judgments, decrees and determinations in all matters within its jurisdiction according to the Constitution, the laws of the State and the common law. The superior court shall hold regular sessions in each district at such times and at such place or places therein as may be designated by rule or order of the supreme court.

Sec. 19. **Effect of Adjournment.** Adjournments from day to day, or from time to time, are to be construed as recesses in the session, and shall not prevent the court from sitting at any time.

Sec. 20. **Seal of Court.** The seal of the superior court shall be a vignette of the official flag of Alaska with the words "Seal of the Superior Court of the State of Alaska", and a designation of the district thereof, surrounding the vignette.

Sec. 21. **Process.** Process of the superior court shall be in the name of the "State of Alaska", be signed by the clerk of the court or his deputy, in the judicial district where the process is issued, be dated when issued, sealed with the seal of the court, and made returnable according to rule prescribed by the supreme court.

Sec. 22. **Qualifications of Judges.** A judge of the superior court shall be a citizen of the United States and of the State, a resident of Alaska for three years immediately preceding his appointment, have been engaged for not less than five years immediately preceding his appointment in the active
tice of law, and at the time of app
ment be licensed to practice la
Alaska. The active practice of law
be as defined for supreme court jus

Sec. 23. **Vacancies.**

(1) **Initial Vacancies.** The
ernor shall initially fill the office
superior court judges within forty
days after receiving nominations
the Judicial Council by appointing
of two or more persons nominate
the Council for each position.

(2) **Vacancies.** The Governor
fill any vacancy in the offices of
rior court judges within forty-five
after receiving nominations from
Judicial Council by appointing or
two or more persons nominated by
Council for each vacant position.

The office of a superior court j
becomes vacant ninety days after
election at which he is rejected
majority of those voting on the
tion, or for which he failed to fil
declaration of candidacy to succeed
self, and his successor may be appoi
during this period, such appointme
become effective upon the vacancy
curring. A vacancy in said offices
also occur by reason of the d
retirement, resignation, forfeiture
removal from office of any judge.
the event of any vacancy other tha
initial vacancy, or immediately
certification of rejection following
election, or immediately upon failu
a judge to file declaration of candi
the Judicial Council shall meet w
the thirty days after any of the

s occur and submit to the Governor ames of two or more persons nomi- to fill each such vacancy.

. 24. **Oath of Office.** Each supe- court judge, upon entering office, take and subscribe to an oath of required of all officers under the itution and such further oaths or ations as may be prescribed by

. 25. **Number of Judges.**

) The superior court shall con- f eight judges, two of whom shall dges in the first judicial district, f whom shall be judge in the second ial district, three of whom shall be s in the third judicial district, and of whom shall be judges in the h judicial district. At the time of itting the names of any nominees e Governor to fill any vacancy on uperior court bench, the Judicial cil shall also designate the district ich the appointee is to first reside erve.

2) A presiding judge shall be nated for each district by the chief e of the supreme court. The pre- g judge shall in addition to his ar judicial duties: (a) assign the pending to the judges made avail- within the district, (b) supervise udges and their court personnel in arrying out of their official duties n the district, and (c) expedite and current the business of the court n the district.

3) The chief justice may assign a e and his court personnel for tem- y duty from time to time not to exceed ninety days annually anywhere in Alaska except to permit completion of hearings in progress, providing however, a judge may be so temporarily assigned for longer and additional periods with his consent.

Sec. 26. **Approval or Rejection.**

(1) Each superior court judge shall be subject to approval or rejection on a separate non-partisan ballot at the first general election held more than three years after his appointment, and if approved by a majority of the electors voting on his candidacy he shall be retained in office. He shall thereafter be subject to approval or rejection in a like manner every sixth year. If a majority of those voting on his candidacy reject his candidacy, he shall not for a period of four years thereafter be appointed to fill any vacancy in the supreme or superior courts of the State.

(2) Each judge seeking to succeed himself to office shall file with the Secretary of State a declaration of such candidacy not less than ninety days before the date fixed for the general election at which approval or rejection is requisite. The judge shall seek approval in the judicial district to which he was originally appointed, except in case of assignments and transfers with the judge's consent, in which case he shall seek approval in the district where he has served the major portion of his term, or where he last stood for election. The Secretary of State shall promptly certify such candidacy to the election officials of the State, who shall prepare, and have available at the polls, a separate judicial district-wide ballot upon

which there shall be stated the proposition: "Shall ..... be retained as judge of the superior court for six years?", with proper provision for the marking of such proposition as "yes" or "no". The ballots shall be counted, returned, canvassed and certified in the manner provided by law for elective officers.

Sec. 27. **Incapacity.** Whenever a judge of the superior court appears to be so incapacitated as substantially to prevent him from performing his judicial duties, the Judicial Council shall recommend to the supreme court that the judge be placed under early retirement. After notice and hearing, the supreme court by majority vote of its members may retire the judge. Notice of the hearing shall be given to the judge in writing at least thirty days prior thereto.

Sec. 28. **Impeachment.** A superior court judge is subject to impeachment by the Legislature for malfeasance or misfeasance in the performance of his official duties. Impeachment shall originate in the Senate and must be approved by two-thirds vote of its members. The motion for impeachment shall list fully the basis for the proceeding. Trial on impeachment shall be conducted by the House of Representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the House is required for a judgment of impeachment. The judgment may not extend beyond removal from office, but shall not prevent proceedings in the courts on the same or related charges.

Sec. 29. **Restrictions.** A superior co judge while holding office may not p tice law, hold office in a political pa or hold any other office or position profit under the United States, the S or its political subdivisions. Any su rior court judge filing for another e tive public office forfeits his judi position.

Sec. 30. **Compensation.**

(1) Each superior judge shall ceive $19,000.00 annually, as compe tion, payable monthly in twelve e installments. The compensation o judge shall not be diminished during term of office, unless by general applying to all salaried officers of State.

(2) No salary warrant shall b sued to any superior court judge u he has made and filed with the S officer designated to issue salary rants an affidavit that no matter ferred to the judge for opinion or cision has been uncompleted or u cided by him for a period of more six months.

Article III. Organization

Sec. 31. **Commencement and Tra of Causes.**

(1) The State courts shall be de organized for the purpose of tran ring causes as provided in Section Article XV of the Constitution of State of Alaska, on the 3rd da January, 1962. Provided, however, causes may be commenced, filed determined in the State courts in judicial district at the time of the

intment of one or more judges for ch district.

(2) The jurisdiction of the courts the State in this Act provided shall exclusive from and after the 3rd day January, 1962 but prior to that date all be non-exclusive, and nothing in is Act shall diminish or deprive the strict Court of the State of Alaska or Court of Appeals or the Supreme urt of the United States of jurisdic- n as provided by Public Law 508, th Congress, and other laws appli- ble thereto.

Sec. 32. **Declaration of Intent and ethod of Transition.** It is the intent the Legislature by the passage of s Act to provide for the organization the State courts in an orderly man- r so that the same will be completed or before January 3, 1962 and so that ring the intervening period advantage y be taken of the district and appel- e structure referred to in Public Law 8, 85th Congress. To effect this inten- n the State courts shall be organized the following manner:

(1) The Judicial Council shall, in operation with and through the facili- s of the Legislative Council, institute udies and make reports and recom- endations with regard to the facilities eded for the establishment of the su- eme and superior courts of the State. ch studies and reports shall include t not be limited to necessary court- om facilities and the location thereof; e number and nature of court at- ches and personnel and the esti- ated salary requirements of each posi- n; recommended rules governing prac- tice and procedure in civil and criminal cases; an estimated annual budget of the costs of operating the proposed supreme and superior court system and an estimate of the capital outlay required for physical facilities such as courtrooms, furnishings and libraries; and such additional information with regard to the administration of justice through the supreme and superior court system as may be required to fully inform the Legislature upon the subject.

(2) Upon the completion of the studies and reports provided in subdivision (1) hereof, copies shall be forthwith transmitted to the Governor and to the Legislature. Thereafter the Judicial Council shall meet and submit to the Governor the names of the persons nominated as the first justices of the supreme court, but in no event earlier than 30 days after submission of said reports and studies to the Legislature, and if the Legislature is not in session then not earlier than 30 days after the Legislature convenes.

(3) Upon the appointment of the first supreme court justices, the supreme court shall, as soon as may be practical, consider the reports and studies of the Judicial Council and thereafter make and promulgate such rules governing the administration of courts and the practice and procedure in civil and criminal cases as the court may deem appropriate. When the court has adopted such rules governing causes and procedure of the supreme and superior courts, the chief justice shall so advise the Judicial Council and within thirty (30) days thereafter the Judicial Council

shall meet and submit to the Governor the names of the persons nominated for some or all of the superior court judges. The Judicial Council may submit the names of all persons nominated as superior court judges for all districts at this time or may submit the names of persons nominated in less than all of the judicial districts or less than all judges provided for in a district in such manner as will provide a gradual series of appointments consistent with the availability of physical facilities and court personnel.

(4) Notwithstanding the provisions of subsections (1), (2) and (3) of this section, in the event that either: a court of competent jurisdiction, by final judgment, declares that the District Court of the State of Alaska lacks jurisdiction to determine causes arising under the laws of the State, notwithstanding the provisions of Public Law 508, 85th Congress; or the President of the Unit States, by executive order, terminat the jurisdiction of the District Court the State of Alaska, the Judicial Cou cil shall forthwith meet and submit the Governor the names of the perso nominated as justices or judges of all the supreme and one or more or superior courts of the State and in a event shall submit all of said nam prior to January 3, 1962.

Sec. 33. **Severability.** The fact th any section, subsection, sentence, clau or phrase of this Act is declared inva for any reason shall not affect the r maining portion of this Act.

Sec. 34. **Effective Date.** This A shall take effect upon its passage a approval or upon becoming law witho such approval.

Approved March 19, 19

Appendix D

In the District Court for the District of Alaska
Third Division

United States of America, Plaintiff, vs. Frank Marrone, Defendant.	Criminal No. 4033
United States of America, Plaintiff, vs. Truman Emberg, Defendant.	Consolidated Criminal No. 4031

OPINION

George N. Hayes, Assistant United States Attorney, Anchorage, Alaska, for the plaintiff.

Wendell P. Kay, Anchorage, Alaska, for defendant Marrone.

Seaborn J. Buckalew, Jr., Anchorage, Alaska, for defendant Emberg.

By order of the Court, these two cases have been consolidated for argument.

The defendants filed a motion for continuance ". . . upon the ground that this Court has no jurisdiction to try the offense with which he is charged,

this court being a Territorial court abolished by the admission of Alaska to Statehood." The question to be determined by the Court is whether the defendants should be granted a continuance until the question of the jurisdiction of the District Court for the Territory of Alaska over state matters is determined by an appellate tribunal.

Both the defendants were indicted for crimes against the Territory of Alaska by the grand jury on November 7, 1958, prior to Alaska's admission into the Union. Their trials before the District Court for the Territory of Alaska were set for April 15 and April 13, 1959, respectively.

The defendants base their argument in support of their motions to continue upon their interpretation of Section 17, Article XV, of the Alaska Constitution, which reads as follows:

> "Section 17. *Transfer of court jurisdiction.* Until the courts provided for in Article IV are organized, the courts, their jurisdiction, and the judicial system shall remain as constituted on the date of admission unless otherwise provided by law. When the state courts are organized, new actions shall be commenced and filed therein, and all causes, other than those under the jurisdiction of the United States, pending in the courts existing on the date of admission, shall be transferred to the proper state court as though commenced, filed, or lodged in those courts in the first instance, except as otherwise provided by law."

In this section, the State of Alaska accepted the then established judicial system of the Territory of

Alaska, including the appellate court, the United States Court of Appeals for the Ninth Circuit, for the transitional period while the state court system was being established. Section 18 of Public Law 85-508, the Alaska Statehood Bill, was Congress's acceptance. This section continues the District Court for the Territory of Alaska and the Commissioners Courts for an interim period, but note that it does not specifically continue the appellate jurisdiction of the United States Court of Appeals for the Ninth Circuit.

Counsel for the defendants further state that Sections 1291, 1292 and 1294 of Title 28 U.S.C.A. no longer confer appellate jurisdiction on the United States Court of Appeals for the Ninth Circuit from matters originating in the Alaska territorial courts as was the system before statehood, for the reason that the District Court for the Territory of Alaska is not a "District Court of the United States," and all references to the District Court for the Territory of Alaska contained in the above sections of Title 28, U.S.C.A., were stricken on the admission of Alaska into the Union by the Terms of Section 12 of the Alaska Statehood Bill, supra. Therefore, they conclude that Alaska's court system does not remain as constituted on the date of Alaska's admission to the Union, and thus Alaska was not granted what it bargained for in the way of a court system as provided in Section 17, Article XV, of its Constitution. The defendants claim that this lack of an appellate tribunal violates the Privileges and Immunities clause of the United States Constitution, Article 4, Section 2, because the citizens

of all the other states in the Union enjoy the right of appeal in all state and federal matters. It is interesting to note that the United States Department of Justice takes a similar position in two Fairbanks cases. See Deere vs. U. S. and Kosters vs. U. S.

I am of the opinion that there is a simple answer to this problem and that is that the United States Court of Appeals for the Ninth Circuit never lost its appellate jurisdiction over the present United States District Court in Alaska in either state or federal matters. Certainly Congress did not intend to leave Alaska without an appellate tribunal. No the thought makes reason stare. Thus, I find that Section 12 of the Alaska Statehood Bill, supra, does not go into effect until the President, by proclamation, terminates the present federal courts in Alaska. See *United States vs. Starling,* Criminal No. 3973, Alaska, Third Division, opinion dated February 21, 1959, at pages 17 and 18.

I am of the opinion that even if Section 12 of the Alaska Statehood Bill, supra, was effective immediately upon the admission of Alaska into the Union, Sections 1291, 1292, and 1294 of Title 28, U.S.C.A., still provided for appeals from the present Alaska courts to the United States Court of Appeals for the Ninth Circuit.

The defendants contend that the removal by Section 12 of the Statehood Act of the references to appeal, to the United States Court of Appeals for the Ninth Circuit, of causes arising in the United States District Court for the Territory of Alaska, from Sections

1291, 1292, and 1294, supra, precludes appeals from this court because it is not a "District Court of the United States." While not referred to at the hearing, I have never been moved or impressed with the theory relating to the jurisdiction of the territorial courts based on the "Magic Words" doctrine. They have ". . . become as sounding brass, or a tinkling cymbal."

Judge Dimond, a distinguished jurist of this court, relied on this doctrine in at least two cases to reach a decision. See *Reese vs. Fultz,* 13 Alaska 227, 96 F. Supp. 449 (1951), and *United States vs. Bell,* 14 Alaska 142, 108 F. Supp. 777 (1952). Judge Denman of the United States Court of Appeals for the Ninth Circuit also relied on this doctrine in his holding that the Norris-LaGuardia Act did not apply in the Hawaiian Federal Courts. In that case there was also strong legislative history to support his conclusion. See *International Longshoreman's and Warehouseman's Union vs. Wirtz,* 170 F. 2d 183 (1948). The difference between the approach of Judge Dimond and this Court is that this Court presumes a federal statute referring to "District Courts of the United States" to include the District Court for the Territory of Alaska until it is shown by the preponderance of the evidence that this was not the intent of Congress. Judge Folta used this approach in regard to the "magic words," "District Court of the United States," found in Section 303 (b) of the Taft Hartley Act. See *Juneau Spruce Corp. vs. International Longshoremen's Union,* 12 Alaska 260, 265; 83 F. Supp. 224, 226 (1949):

"The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business . . .

"Under the construction urged by the defendants the Board would be deprived of any forum in which to enforce its orders, so far as the Territory of Alaska is concerned, if the Court of Appeals for the 9th Circuit were in vacation. And a similar result would follow if the Board should proceed under Section 10(j). But that is not all. Provision is made in Section 11(2) for the enforcement of the process of 'any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia.' But in Section 302(e), empowering the district courts of the United States and the United States courts of the territories and possessions to enjoin violations of the act, the District of Columbia is omitted, so that, literally construed, violations of the act may be enjoined everywhere, including the possessions, where it is clear under Section 2(6) that the act has no application whatever, except in the District of Columbia. It is thus apparent that, if defendants' view of the law is correct, the courts are empowered under Sections 11(2) and 302(e) to enforce

their orders by subpoena and injunction in the possessions, where the substantive provisions of the act have no application, but not by injunction in the District of Columbia where obviously such provisions are in force and effect.

"It would seem, therefore, that if such consequences are to be avoided the statute must be given such a construction as will be reasonable and consistent with its provisions. That it was not the intent of Congress to limit jurisdiction to the constitutional courts seems reasonably clear, and indeed authority for this view is not wanting. Thus in United States v. Brotherhood of Locomotive Engineers, D.C., 79 F. Supp. 485, and United States v. International Union, United Mine Workers, D.C., 77 F. Supp. 563, injunctions were issued by Judge Goldsborough of the District Court of the United States for the District of Columbia under a provision of Section 208(a) granting such power to 'any district court of the United States.' Manifestly, if defendants' view is correct, that Court was without power to act in these cases. But the decision which in my opinion is decisive of this controversy is Federal Trade Commission vs. Klesner, 274 U.S. 145, 47 S. Ct. 557, 71 L. Ed. 972, in which the term 'circuit court of appeals of the United States' in the Federal Trade Commission Act, 15 U.S.C.A. Sec. 41 et seq., was held, in an almost identical factual situation, to comprehend the Court of Appeals for the District of Columbia.

"Other considerations lend support to the construction urged by the plaintiff, not the least of which is that the very lack of uniformity and consistency in the use of the term 'district court of the United States' throughout the act itself

shows not only the futility of construing the term in a literal or restricted sense, but also that such could not have been the Congressional intent. It is undoubtedly the duty of the Court to ascertain the intent of Congress from the words used in the act, in the light of its aims, and to extend its operation to broader limits than its words appear to import if the Court is satisfied that their literal meaning would deny application of the act to cases which it was the intent of Congress to bring within its scope. The statute is remedial. It should be so construed as to prevent the mischief and advance the remedy.

"In view of the fact that this Court is vested with the jurisdiction of a district court of the United States and my conclusion that it was the legislative intent that the act should have a general and uniform application, I am constrained to hold that the term 'district court of the United States,' as used in the act, comprehends this Court. Accordingly, the demurrer should be overruled."

The presumption derived from the wording of the Taft Hartley Act is almost identical with that in Section 12 of the Alaska Statehood Bill, supra. Why should the Alaska Statehood Act be interpreted differently?

The United States Court of Appeals for the Ninth Circuit, speaking through Judge Bone, treated the "magic words" argument in the Juneau Spruce case, supra, in the same fashion as Judge Folta. See *International Longshoremen's Union vs. Juneau Spruce Corp.*, 13 Alaska 291, 307; 189 F. 2d 177, 184 (1951), where Judge Bone held as follows:

"Regardless, however, of the status of Alaska 'local law' we cannot bring ourselves to believe that Congress framed the provisions of the Act so as to create a right of action under Section 303 but deliberately denied application of the important provisions of Section 301 in the event a cause of action was asserted in the Alaska court. The complexities (and the lack of any general rule of application) of 'local law' and common law principles in relation to suits against unincorporated associations such as labor unions presented one of the serious problems receiving attention and consideration at the hands of Congress, as is clearly indicated in committee reports. See Senate Report No. 105 (by Senator Taft) Legislative History of the Labor-Management Relations Act, Vol. 1, pp 421, 422, 423. This contemplation of the law carries the conviction that Congress clearly intended the provisions of Section 301 to be applied by the 'district court for the Territory of Alaska' in actions based upon the provisions of the Act.

"It is certain that Congress adopted the Act with full knowledge that the only court in the entire Territory of Alaska which could possibly entertain and adjudicate a cause of action arising under the Act was the lower court—a federal court created by Congress and vested with the jurisdiction of district courts of the United States. It is noteworthy that in referring to the right to sue a labor organization 'as an entity', and to serve an 'officer or agent of a labor organization,' Section 301, subdivisions (b) and (d) provide for such procedure in a 'court of the United States'. Even if this court were not 'a district

court of the United States', it is unquestionably, and under any test, a 'court of the United States.'

"No plausible or acceptable reason has been suggested to us as a basis for the conclusion that Congress intended to create the strange geographical hiatus in the law that acceptance of appellants' construction of the Act would produce. To adopt such a conclusion would require a construction of its terms so strict and narrow as to evince disregard of the dominating reasons assigned by Congress for its enactment. In short, it would mean that, for most purposes, the law was a dead letter in Alaska. Upon at least two occasions the Supreme Court refused to construe the literal language of statutes in a manner which would disregard and thereby frustrate the obvious purpose and policy of the legislation involved and produce unreasonable or absurd results. We adopt the rationale of the rule applied in these cases.

"The spirit, tenor and purport of the Act also convince us that Congress intended to bring *all* aspects of labor-management relations in Alaska which affect commerce within the ambit of the Act. We are persuaded that the lower court had jurisdiction to entertain and adjudicate the instant cause and to apply the provisions of Section 301. We further hold that Congress intended the language of Section 303 (which refers to district courts of the United States) to embrace and include 'the district court for the Territory of Alaska.' And in this connection we are generally in accord with the opinion expressed by the trial court on the subject of the jurisdiction of that court as related to the issues in this case."

It is noteworthy that Judge Bone thought that the District Court for the Territory of Alaska was even a "Court of the United States."

When the Juneau Spruce case, supra, was appealed to the Supreme Court of the United States, Justice Douglas treated the "magic words" argument in the following manner:

> "*First.* This suit was brought in the District Court for the Territory of Alaska. And the question which lies at the threshold of the case is whether that court is a 'district court of the United States' within the meaning of Sec. 303(b) of the Act. That court has the jurisdiction of district courts of the United States by the law which created it. 48 U.S.C. Sec. 101, 48 U.S.C.A. Sec. 101. Yet vesting it with that jurisdiction does not necessarily make it a district court for all the varied functions of the Judicial Code. See Reynolds v. United States, 98 U.S. 145, 154, 25 L. Ed. 244; McAllister v. United States, 141 U.S. 174, 11 S. Ct. 949, 35 L. Ed. 693; United States v. Burroughs, 289 U.S. 159, 163, 53 S. Ct. 574, 576, 77 L. Ed. 1096; Mookini v. United States, 303 U.S. 201, 205, 58 S. Ct. 543, 545, 82 L. Ed. 748. The words 'district court of the United States' commonly describe constitutional courts created under Article III of the Constitution, not the legislative courts which have long been the courts of the Territories. See Mookini v. United States, supra, 303 U.S. at page 205, 58 S. Ct. 545. But we think in the context of this legislation they are used to describe courts which exercise the jurisdiction of district courts. The jurisdiction conferred by Sec. 303 (b) is made 'subject to the limitations governing district courts as respects

the amount in controversy and the citizenship of the parties'; it defines the capacity of labor unions to sue or be sued; it restricts the enforceability of a money judgment against a labor union to its assets; and it specifies the jurisdiction of a district court over a union and defines the service of process. Congress was here concerned with reshaping labor-management legal relations, and it was taking steps to declared and announced objectives. One of those was the elimination of obstacles to suits in the federal courts. It revised the jurisdictional requirements for suits in the district courts, requirements as applicable to the trial court as to any court which in the technical sense is a district court of the United States. The Act extends in its full sweep to Alaska as well as to the states and the other territories. The trial court is indeed the only court in Alaska to which recourse could be had. Even if it were not a 'district court' within the meaning of Sec. 303 (b) it plainly would be 'any other court' for purposes of that section. As such other court it might or might not have jurisdiction over this dispute depending on aspects of territorial law which we have not examined. But since Congress lifted the restrictive requirements which might preclude suit in courts having the district courts' jurisdiction, we think it is more consonant with the uniform, national policy of the Act to hold that those restrictions were lifted as respects all courts upon which the jurisdiction of a district court has been conferred. That reading of the Act does not, to be sure, take the words 'district court of the United States' in their historic, technical sense. But literalness is no sure touchstone of legislative purpose. The purpose here is more

closely approximated, we believe, by giving the historic phrase a looser, more liberal meaning in the special context of this legislation."

See *International Longshoremen's Union vs. Juneau Spruce Corp.* 13 Alaska 536, 541; 342 U.S. 237, 240 (1952).

Under the reasoning of the courts in the Juneau Spruce case, supra, and this Court's prior expressed beliefs on the subject of "District Court of the United States," (*U. S. vs. King,* 14 Alaska 500; 119 F. Supp. 398 (1954)), I am of the opinion that the United States Court of Appeals for the Ninth Circuit has appellate jurisdiction over the United States District Court for the Territory of Alaska under the pertinent portions of Sections 1291, 1292, and 1294 of Title 28, U. S. C. A., which read as follows:

"Sec. 1291 Tit. 28 USCA FINAL DECISIONS OF THE DISTRICT COURTS. The courts of appeals shall have jurisdiction of appeals from all final decisions of the *district courts of the United States,* . . .

"Sec. 1292 Tit. 28 USCA INTERLOCUTORY DECISIONS. (a) The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, . . .

"Sec. 1294 Title 28 USCA CIRCUITS IN WHICH DECISIONS REVIEWABLE. Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: (1) From a district court of the United States to the Court of Appeals for the circuit embracing the district; . . ."

Assuming, for the purposes of argument, that the United States Court of Appeals for the Ninth Circuit does not have appellate jurisdiction over cases presently arising in the courts of Alaska, the defendants' problem of no appeal could only be solved by the Legislature of Alaska. By a stroke of its pen, Alaska could end the state jurisdiction of the present territorial courts. The reason the Alaska Legislature must solve this problem is because there is no constitutional right to appeal. See *Tinkoff vs. United States,* 86 F. 2d 868 (7 Cir. 1937); *United States vs. St. Clair,* 42 F. 2d 26 (8 Cir. 1930); *Williams vs. United States,* 1 F. 2d 203 (8 Cir. 1924).

Counsel for the defendants have relied principally upon the case of *Coyle vs. Oklahoma,* 221 U. S. 559 (1910), which can easily be distinguished on the facts. In that case the legislature of Oklahoma authorized the moving of the state capital from Guthrie to Oklahoma City contrary to a provision of the Oklahoma Statehood Bill. The United States Supreme Court said this action was within a state's power after it was admitted to the Union. Likewise it is the Alaska Legislature's prerogative to abolish the present territorial courts' jurisdiction over state matters any time it sees fit.

For the reasons stated, the motion for a continuance is denied.

Dated at Anchorage, Alaska this 9th day of April, 1959.

/s/ J. L. McCarrey, Jr.
U. S. District Judge

No. 16,416

IN THE

United States Court of Appeals

For the Ninth Circuit

AUDY W. DEERE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court for the District of Alaska, Fourth Division

APPELLEE'S BRIEF

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GEORGE M. YEAGER,
United States Attorney,
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APPELLEE'S BRIEF

STATEMENT OF FACTS

On May 5, 1958, appellant was found guilty after a jury trial in the Justice Court for the Fairbanks Precinct, Territory of Alaska, of the offense of operating a motor vehicle while under the influence of intoxicating liquor, in violation of Section 50-5-3 of the Alaska Compiled Laws Annotated, 1949, as amended. A judgment was thereupon entered adjudging him guilty and sentencing him to pay a fine of $250.00 and 30 days revocation of his driver's license.

Appellant appealed to the District Court for the District of Alaska, Fourth Division, was tried in that court on February 18, 1959, and was found guilty after a jury trial *de novo*. On March 3, 1959, a judgment was entered sentencing appellant to pay a fine

of $500.00, to revocation of his driver's license for 30 days, and to serve 30 days in jail. The jail sentence was suspended on condition that he pay the fine. Appellant filed a notice of appeal to this Court on March 3, 1959.

ARGUMENT

While appellant challenges the jurisdiction of the interim Alaska district court to enter the judgment against him, he does not deal with the issue of the jurisdiction of this Court to review the judgment on appeal. Indeed, he apparently concedes that he "is bereft of his right of appeal" in the absence of any provision under the Alaska Constitution providing therefor (Br., p. 7). And the argument that the judgment of the Alaska court is *coram non judice* and that the enabling legislation, in so far as it purports to grant jurisdiction to the interim court, is completely void, is inconsistent with appellant's inarticulated assumption that this Court, in the absence of specific statutory authority, may make such a determination on appeal.

In our brief on behalf of the Attorney General, as *amicus curiae*, in the case of *Parker v. McCarrey,* to which the Court is respectfully referred, we have fully explained the position of the government on the issues involved in this case. As we have there shown, this Court no longer has appellate jurisdiction over the interim Alaska district court, particularly as to state offenses such as the one involved here, not only because of the specific repealer in Section 12 of the

Alaska Statehood Act, but also by operation of law. With the advent of Alaska statehood, the trial court lost its status as a territorial court and assumed the status of a state court, which it retains until the institution of permanent courts. Moreover, as we also show in our brief in *Parker,* even if the interim Alaska district court is considered a federal legislative court, this Court would not have appellate jurisdiction over its proceedings in the absence of specific statutory authority therefor.

Here we have a state offense tried by a court which we believe to be a state court. Such review as appellant may have must necessarily be in the Supreme Court of the United States under its power to review judgments of state courts of last resort.

CONCLUSION

For the foregoing reasons, and for the reasons more fully set forth in the brief on behalf of the Attorney General in the *Parker* case, we respectfully submit that the appellee's motion to dismiss the appeal should be granted.

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May, 1959.